CHAPTER 8

RELIGION

LEGAL STANDARDS FOR RELIGION

A. Introduction/Overview

The Fair Employment and Housing Act (FEHA) prohibits California employers from discriminating against employees, job applicants and independent contractors on the basis of religious creed.[1] Thus, an employer may not refuse to hire, promote or admit to a training program or impose different terms, conditions or privileges of employment upon an individual because of his/her religious beliefs, practices or observances.

The FEHA also imposes upon California employers the obligation to grant employees reasonable accommodation of their religious beliefs, practices or observances when those beliefs, practices or observances conflict with employment requirements.[2]

In addition, harassment because of religion is unlawful.[3] Liability for workplace harassment can be imposed upon both the employer and the individual who engaged in the unlawful conduct.[4] Harassment and employment actions are unlawful if based upon:

1. Affiliation – harassing or otherwise discriminating because an individual is affiliated with a particular religious group.

   Example: An individual is subjected to workplace harassment because he/she is a member of a particular religious organization, e.g., the Catholic church.

2. Physical or cultural traits and clothing – harassing or otherwise discriminating against an individual because of his/her physical, cultural or linguistic characteristics, such as manner of speech or dress associated with a particular religion. An employer's fear or knowledge that customers or co-workers may be or are "uncomfortable" about an employee or applicant's characteristics or

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[1] Gov. Code, § 12940, subds. (a) and (l).

[2] Gov. Code, § 12940, subds. (a) and (l); Cal. Code Regs., tit. 2, §§ 7293.1 and 7293.3; *Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 369-70; *DFEH v. Centennial Bank* (1987) FEHC Dec. No. 87-03; *DFEH v. District Lodge 120, International Association of Machinists and Aerospace Workers* (1981), FEHC Dec. No. 81-07; *DFEH v. Union School District* (1980) FEHC Dec. No. 80-32.

[3] Gov. Code, § 12940, subd. (j).

[4] *Ibid*.

concern about company "image" never justify the denial of an employment opportunity or failure to prevent or remedy workplace harassment.

Example: A woman participates in a telephone interview during which the employer offers her the job. However, when she reports to work wearing a hijab, a body covering and/or head-scarf worn by some Muslims, the supervisor appears shocked and tells her that someone "better suited to the job" has been selected. If the supervisor's reaction and resultant denial of employment is due to the discovery that the employee wears a hijab because she is Muslim, the employer will be found to have violated the law.

3. Perception – harassing or otherwise discriminating because of the perception or belief that a person is a member of a particular religious group whether or not that perception is correct.

Example: An employee is subjected to workplace harassment because he is Sikh and wears a turban which is a religiously-mandated item of clothing.

4. Association – harassing or otherwise discriminating because of an individual's association with a person or organization of a particular religion.

Example: An employer refuses to promote an employee because he/she associates with an individual who is Jewish.[5]

B. Jurisdiction

The FEHA's prohibitions against discrimination apply to California "employer[s]," as that term is defined in Government Code section 12926, subdivision (d):

> "Employer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows:
>
> "Employer" does not include a religious association or corporation not organized for private profit.[6]

The provisions also apply to all other "covered entities:"

> A "covered entity" is any person (as defined in Gov. Code, § 12925, subd. (d).),[7] labor organization, apprenticeship training program, training

[5] See Equal Employment Opportunity Commission, "Employment Discrimination Based on Religion, Ethnicity, or Country of Origin," http://www.eeoc.gov/facts/fs-relig_ethnic.html.
[6] See Gov. Code, § 12926.2.

program leading to employment, employment agency, governing board of a school district, licensing board or other entity to which the provisions of Government Code sections 12940, 12943, 12944 or 12945 apply.

If the complainant alleges that he/she has been subjected to unlawful harassment because of his/her religion, in order for DFEH to have jurisdiction over the complaint, it must establish that there existed an employment relationship. In the case of harassment, it is sufficient to establish that the person or entity had one or more employees.[8]

In 1999, the California Legislature amended the FEHA[9] by adding two sections clarifying the scope of the jurisdictional exemption granted to religious entities. A "religious corporation" is defined in subdivision (a) as a corporation "formed primarily or exclusively for religious purposes" either under California law or "the laws of any other state to administer the affairs of an organized religious group and that is not organized for private profit."

Included within the FEHA's definition of "employer" are religious associations or corporations whose employees "perform duties, other than religious duties, at a health care facility operated by the religious association or corporation for the provision of health care that is not restricted to adherents of the religion that established the association or corporation."[10] The California Supreme Court has interpreted this section of the FEHA to mean that the exemption is only "intended to apply to hospitals with a religious affiliation and motivation."[11]

A religious corporation may "restrict eligibility for employment in any position involving the performance of religious duties to adherents of the religion for which the corporation is organized."[12] Section 12926.2, subdivision (b), defines "religious duties" as those "duties of employment connected with carrying on the religious activities of a religious corporation or association." The religious exemption from the FEHA applies to "a religious corporation with respect to either the employment, including promotion, of an individual of a particular religion, or the application of the employer's religious doctrines, tenets, or teachings, in any work connected with the provision of health care"[13] or concerning "the promotion, of an individual of a

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[7] "Person" includes one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries. (Gov. Code, § 12925.)

[8] Gov. Code, § 12940, subd. (j)(4)(A).

[9] Assembly Bill No. 1541 (1999-2000 Reg. Sess.), Stats. 1999, ch. 913, §§1, 2.

[10] Gov. Code, § 12926.2, subd. (c).

[11] *Silo v. CHW Medical Foundation* (2002) 27 Cal.4th 1097, citing *Kelly v. Methodist Hospital of Southern Cal.* (2000) 22 Cal.4th 1108, 1121-25.

[12] Gov. Code, § 12922.

[13] Gov. Code, § 12926.2, subd. (d).

particular religion in an executive or pastoral-care position connected with the provision of health care."[14]

Example: A hospital is owned and operated by a religious organization, formed in accordance with the applicable laws of California. The hospital's employees perform a wide range of duties, including patient care, which the hospital provides to members of the public, not just persons who are members of the same religious denomination. The hospital also employs persons who have been ordained as ministers by the religious denomination to serve in the position of "chaplain" performing duties such as visiting and praying with patients, leading worship in the hospital chapel, and recording weekly religious messages which are broadcast via the hospital's public address system at specific times.

DFEH has jurisdiction over the hospital with regard to a complaint of discrimination filed by an employee whose duties are not specifically religious in nature. So, for instance, if a nurse complains that she has been subjected to discrimination because of her race, DFEH has jurisdiction to receive and investigate her claim.

However, DFEH does not have jurisdiction to receive or investigate a complaint of discrimination filed by an employee who performs religious duties such as proselytizing or teaching about the religious denomination's beliefs or practices. Therefore, DFEH would have not have jurisdiction over a complaint alleging discrimination because of age filed by a chaplain because the position exists to perform religious duties including pastoral care. Likewise, the hospital may require, because of the managerial functions performed, its executives to be members of the religious denomination or organization which owns and operates the hospital. If so, DFEH would not have jurisdiction over a complaint of discrimination filed by the hospital's administrator.

A detailed discussion of all factors relevant to a determination of whether DFEH has jurisdiction over the complaint is set forth in the Chapter entitled "Jurisdiction." Additionally, DFEH staff should refer to Enforcement Division Directive Number 213 entitled "Complaints Against Religious, Non-Profit Organizations."

C. Elements of the Prima Facie Case of Discrimination

1. Religious Creed Discrimination/Disparate Treatment

The elements of a prima facie case of discrimination because of religious creed are:

a. The employee had a bona fide religious belief or observance that conflicted with an employment requirement;

[14] Gov. Code, § 12926.2, subd. (e).

b. The employee brought the practice to his/her employer's attention; and

c. The employer took an adverse employment action (e.g., termination, failure to hire or select, etc.) against him/her because of his/her religious belief or observance.[15]

Some courts enunciate the elements of the prima facie case in accordance with the analysis applicable to disparate treatment cases:

a. The complainant was a member of a protected class, i.e., he/she has a sincerely held religious belief;

b. He/she was qualified for his/her position;

c. He/she experienced an adverse employment action; and

d. Similarly situated individuals outside his/her protected class were treated more favorably or other circumstances surrounding the adverse employment action give rise to an inference of discrimination.[16]

There must be a causal connection (nexus) between the employee's religious belief or observance and the adverse employment action taken by the employer. The employee's sincerely held religious belief or request for accommodation of his/her belief or practice(s) need not be the sole or even dominant cause for the adverse action, but need only be one of the factors that influenced the employer 's decision to take the adverse action.

The employer's perception that the employee adheres to a particular religious creed will be sufficient to establish a violation of the FEHA. The employee does not actually have to ascribe to the belief or observance in question.

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[15] *Kreilkamp v. Roundy's, Inc.* (2006) 428 F.Supp.2d 903. Note that the courts have observed that the analysis of a religious discrimination claim is the same under either the FEHA or Title VII of the Federal Civil Rights Act of 1964. The antidiscrimination objectives and public policies of the two statutory schemes are the same, even though the wording is somewhat different. Therefore, federal decisions may be referenced to interpret those portions of the FEHA that are analogous to Title VII. (*Rodriguez v. Airborne Express* (9th Cir. 2001) 265 F.3d 890, 896; *Okoli v. Lockheed Tech. Operations Co.* (1995) 36 Cal.App.4th 1607, 1614.)

[16] *Berry v. Department of Social* Services (9th Cir. 2006) 447 F.3d 642, 656; *Madsen v. Associated Chino Teachers* (2004) 317 F. Supp.2d 1175.

2. Failure to Provide Reasonable Accommodation

To establish that an employer has violated the FEHA by failing to provide a reasonable accommodation of an employee's religious belief or observance, DFEH must show:

a. The employee had a bona fide religious belief or observance that conflicted with an employment requirement;

b. The employer was informed or became aware of the conflict; and

c. The employer failed to accommodate the employee's religious belief or observance.[17]

In some cases, the employer will have taken or threatened to take adverse employment action against the employee because of his/her failure or refusal to comply with the conflicting employment requirement after the request for accommodation was denied.[18]

The employer's obligation to provide a reasonable accommodation arises when the employer's neutral workplace policy or rule conflicts with the religious belief or observance of the employee.

There must be a causal connection (nexus) between the employee's request for accommodation and the adverse employment action taken by the employer. The employee's request for accommodation need not be the sole or even

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[17] Government Code section 12940, subdivision (l), "bars employers from discriminating against a person because of a conflict between his or her religious belief and an employment requirement, unless it has explored ways of accommodating the religious practice and is unable to reasonably accommodate those beliefs. This provision is distinct from Section 12940(a) because it makes unlawful adverse employment action taken not because of the employee's creed but rather because of a conflict between the creed and an employment requirement. . . [However, t]he analysis of whether there was an adverse employment action is identical under this provision as under 12940(a), and so is the conclusion." (*Lewis v. United Parcel Service, Inc.* (2005) 2005 WL 2596448. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.])

[18] *California Fair Employment and Housing Commission v. Gemini Aluminum* (2004) 122 Cal.App.4th 1004, 1012; *DFEH v. California Department of Corrections* (1997) FEHC Dec. No. 97-10, p. 11. Unlike in cases alleging discrimination because of religious belief, practice or observance, in order to establish the prima facie elements of a claim based upon a failure to provide a reasonable accommodation, it is not necessary to demonstrate that the employee was actually subjected to adverse employment action. Rather, "the *threat* of discharge (or other adverse employment practices) is a sufficient penalty." (*Opuku-Boateng v. State of Cal.* (9th Cir. 1996) 95 F.3d 1461, citing *E.E.O.C. v. Townley Engineering & Mfg. Co.* (9th Cir. 1988) 859 F.2d 610, 614, *cert. denied,* 489 U.S. 1077.

dominant cause for the adverse action, but need only be one of the factors that influenced the employer's decision to take the adverse action.[19]

3. Harassment Because of Religion

Employers must prevent workplace harassment of their employees because of their religious creed.[20] California employers have an affirmative obligation to take all reasonable steps to prevent harassment from occurring which many courts have interpreted as requiring them to draft, adopt, and implement an anti-harassment policy and have in place an effective procedure for reporting, investigating and correcting harassing conduct.

For a complete discussion, see the Chapter entitled "Harassment."

D. Sincerely Held Religious Beliefs or Observances

1. Definition and Scope of Permissible Employer Inquiry

The terms "religious creed," "religion," "religious observance," "religious belief," and "creed" include all aspects of religious belief, observance, and practice.[21] Religious belief or observance . . . includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.[22]

"Religious creed" includes any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions.[23]

The California courts have grappled with the question of what constitutes a "religion" or "religious belief." For instance, the California Supreme Court observed that a religious belief is something other than "a philosophy or a way of life," noting that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit . . . protection."[24]

The courts have rejected the notion that belief in a Supreme Being is a requirement. "There are forms of belief generally and commonly accepted as religions and whose adherents . . . practice what is commonly accepted as

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[19] *DFEH v. California Department of Corrections* (1997) FEHC Dec. No. 97-10, p. 11.
[20] Gov. Code, § 12940, subd. (j)(1).
[21] Gov. Code, § 12926, subd. (o) [emphasis added].
[22] Gov. Code, § 12940, subd. (l).
[23] Cal. Code Regs., tit. 2, § 7293.1.
[24] *Friedman v. Southern Cal. Permanente Medical Group* (2002) 102 Cal.App.4th 39, 46-47, rehearing denied, review denied, citing *Smith v. Fair Employment and Housing Com.* (1996) 12 Cal.4th 1143, 1167-68.

religious worship, which do not include or require as essential the belief in a deity. Taoism, classic Buddhism, and Confucianism, are among these religions."[25]

Therefore, the "only [proper] inquiry . . . is the objective one of whether or not the belief occupies the same place in the lives of its holders that the orthodox beliefs occupy in the lives of believing majorities, and whether a given group that claims the exemption conducts itself the way groups conceded to be religious conduct themselves . . . This simply means that 'religion' fills a void that exists in the lives of most men. Regardless of why a particular belief suffices, as long as it serves this purpose, it must be accorded the same status of an orthodox religious belief . . . Religion simply includes:

a. A belief, not necessarily referring to supernatural powers;

b. A cult, involving a gregarious association openly expressing the belief;

c. A system of moral practice directly resulting from an adherence to the belief; and

d. An organization within the cult designed to observe the tenets of belief."[26]

2. Beliefs Entitled to Protection Under the FEHA

An *extensive* variety of beliefs, observances, and practices are subject to the protections set forth in the FEHA, including, but not limited to:

a. Traditionally recognized religion:

   1) The employee is a member of the religion and the practice in question is mandated by the religion.

   2) The employee is a member of the religion and the practice is not mandated by the religion, but the employee sincerely believes that the observance or practice is necessary in order to carry out his/her own religious beliefs.

   3) The employee is not a member of the particular religion, but follows/ascribes to its beliefs.

   4) The employee's beliefs are ethical and/or moral beliefs derived from an established religion.

b. Not part of traditionally recognized religion:

[25] *Id*. at 47-48, citing *Fellowship of Humanity v. Alameda County* (1957) 153 Cal.App.2d 673, 684.
[26] *Ibid*.

1) Beliefs that are religious in nature, e.g., beliefs that consider the nature or scheme of human existence in relationship to a Supreme Being.

2) Beliefs regarding the non-existence or questioning of the existence of a Supreme Being, e.g., atheism or agnosticism.

Among the factors the courts will consider are "whether the belief system occupies in a person's life a place *parallel* to that of God in recognized religions and whether it addresses ultimate concerns thereby filling a void in the individual's life."[27] The Equal Employment Opportunity Commission (EEOC) defines the term "religious practices" to "include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views . . . The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee."[28]

Note, however, that while the belief in or questioning of the existence of a Supreme Being is a frequently observed aspect of both traditionally and nontraditionally recognized religion, the courts have held that it is not a requirement.

3. Three-Factor Analytical Approach

A three-factor analytical analysis was adopted by one California court to aid in distinguishing between a religion and secular belief system:

a. A religion addresses fundamental and ultimate questions having to do with deep and imponderable matters.

b. A religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching.

c. A religion often can be recognized by the presence of certain formal and external signs.[29]

Example: The complainant was employed as a Day Room Manager for a communications company and, in that capacity, supervised eight employees. He was also a member of and "reverend" in the World Church of the Creator, an organization that preaches a system of beliefs called

[27] *Ibid.*
[28] *Id*. at 55-56, citing 29 C.F.R. § 1605.1.
[29] *Id.* at 69.

"Creativity." The central tenet of the group is a belief in white supremacy. Literature published by the organization states: "[W]e believe that what is good for the White Race is the highest virtue, and what is bad for the White Race is the ultimate sin." Although the World Church of the Creator considers itself to be a religion, it does not espouse a belief in God, an afterlife or any form of supreme being, calling such beliefs "nonsense about angels and devils and gods and . . . silly spook craft" which members reject in favor of "the Eternal Laws of Nature, about which the White Man does have an impressive fund of knowledge." One of the group's two central texts is called "The White Man's Bible."

The complainant was interviewed by and pictured in a local newspaper. In the article, he described his involvement in the church and its beliefs. The following day, he was placed on suspension by his supervisor and demoted via letter two days later. His employer referenced the newspaper article, stating that all of the company's employees were aware of it. "Our office has three out of eight employees who are not White. . . . As a supervisor, it is your responsibility to train, evaluate, and supervise telephone solicitors. Our employees cannot have confidence in the objectivity of your training, evaluation, or supervision when you must compare Whites to non-Whites. Because the company, present employees, or future job applicants cannot be sure of your objectivity, you can no longer be a supervisor and you are hereby notified of your demotion to a telephone solicitor . . ."

The complainant claimed he had been subjected to discrimination because of his religion. The court found that the complainant had a sincerely held belief in the teachings of Creativity. The complainant considered his beliefs religious and viewed Creativity as his religion. It played a central role in his life and he had taken an oath in order to become a minister that required him to promote the organization's teachings, adhere to its commandments, forsake affiliation with all other "pro-White" organizations, "aggressively convert others to our Faith and build my own ministry." The complainant's beliefs occupied a place in his life parallel to that held by a belief in God for members of more mainstream theistic religions.

The court rejected the employer's argument that the organization was akin to the Ku Klux Klan[30] and National Socialist White People's Party, both of whom have been held by federal courts <u>not</u> to be religious groups. The fact that a group's beliefs are political does not conclusively establish that they are not also religious.

The court also rejected the employer's assertion that the group's beliefs were not religious because they were "immoral and unethical." The law does not

[30] See *Bellamy v. Mason's Stores, Inc.* (1973) 368 F.Supp. 1025.

protect only those beliefs that employers, society, the court "or some other entity considers moral or ethical in the subjective sense." The courts will look to see if the claimed religious belief system includes a means to distinguish right from wrong and the World Church of the Creator does so: "Creativity teaches that followers should live their lives according to what will best foster the advancement of White people and the denigration of all others. This precept, although simplistic and repugnant to the notions of equality that undergird the very nondiscrimination statute at issue, is a means for determining right from wrong." Thus, the complainant succeeded in demonstrating that his beliefs and membership constituted a religious creed and religion.[31]

4. "Sincerely Held" Religious Beliefs Must Be the Employee's Own

In order to be deemed "sincerely held," the belief or practice asserted by the employee must be his/her own. In other words, the belief or observance in question must be personal to and adopted by the employee in question, not some other person.

> *Example: A grocery bagger at a food store was told by his supervisor that, in conjunction with the store's holiday promotions, all employees would be required to wear holiday-themed necklaces that were being sold in the store. The necklaces featured holiday characters such as Santa Claus, an angel, a snowman, and a gingerbread man. The bagger was instructed to wear a gingerbread man necklace, but refused claiming that he had a practice of not wearing jewelry. The supervisor stressed that a failure to wear the necklace constituted insubordination and would lead to discipline. The bagger then put on the necklace and worked his entire scheduled shift. The next day, the bagger was observed wearing the necklace inside his work smock such that it was not visible to customers. The bagger's supervisor again reminded him that wearing the necklace was a requirement being imposed upon all store employees and a failure to comply would result in discipline up to and including termination of employment.*
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> *At that point, the bagger advised his supervisor that he was uncomfortable wearing the necklace because his birth father was Jewish. The supervisor directed the bagger to go home early, but he was paid for his entire scheduled shift. The bagger filed a complaint, contending that he was subjected to religious discrimination.*
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> *The court dismissed the lawsuit, finding that the bagger failed to inform his employer or establish that he had a "practice of a religious nature that conflicted with [the store's] requirement to wear the necklace." The bagger's initial stated dislike of jewelry, followed by the revelation of his Jewish heritage, was insufficient to demonstrate that "he observed a*

[31] *Peterson v. Wilmur Communications, Inc.* (2002) 205 F.Supp.2d 1014.

particular religious practice that conflicted with the store's policy. His only claim was that [one of his birth parents] was Jewish. This information fell short of putting [the store] on notice that [his] religious beliefs conflicted with the store policy." Employers are "not charged with detailed knowledge of the beliefs and observances associated with particular religious organizations. [Cite omitted.] In [the store's] view, the necklace [the bagger] had been asked to wear had no religious connotation, and [the bagger] did not explain how wearing the necklace would conflict with his religious beliefs." Mere affiliations do not rise to the level of establishing a bona fide belief, observation or practice.[32]

5. Beliefs or Observances Not Entitled to Protection under the FEHA

The types of beliefs and/or observances that are *not* subject to the protections provided by the FEHA include, but are not limited to:

a. Mere preferences not founded upon theological, spiritual or similar principles, such as personal life choices based upon economic, social, or other ideologies, a philosophy or way of life.

b. Purely political beliefs, preferences or activities.

Example: The complainant was a strict vegan who believed that all living beings must be valued equally and, therefore, it is immoral and unethical for humans to kill and exploit animals, even for food, clothing and the testing of product safety for humans. In accordance with his beliefs, the complainant declared that he did not eat meat, dairy products, eggs, honey or any other food containing ingredients derived from animals. He did not wear leather, silk or any material that came from animals and did not use any product tested for human safety on animals or which derived any ingredients from animals. He contended that his beliefs were spiritual in nature and he had held them with the strength of traditional religious views for more than nine years. He asserted that his beliefs occupied a place in his life parallel to that filled by God in traditionally religious individuals adhering to the Christian, Jewish or Muslim faiths.

The complainant was offered a permanent position in a pharmaceutical warehouse. The employer required that all employees be vaccinated with the mumps vaccine, but the complainant refused on the ground that the

[32] *Kreilkamp v. Roundy's, Inc.* (2006) 428 F.Supp.2d 903. The court also found that the bagger was not subjected to an adverse employment action because he was sent home early, but paid for the entire shift. By the time he returned to work, the holiday promotion had ended and the necklace was no longer an issue. The court observed that "[n]ot everything that makes an employee unhappy is actionable adverse action." Plainly, the bagger's "dissatisfaction at being sent home two hours early, with full pay and no discipline, does not rise to actionable adverse action."

vaccine is grown in chicken embryos, thus, to submit to vaccination would violate his system of beliefs and be immoral. When the employer withdrew the job offer, the complainant claimed he had been subjected to religious creed discrimination.

Utilizing the three-factor analysis set forth above, the court found that the complainant's veganism was a personal philosophy and way of life, but not a religious creed within the meaning of the FEHA.

1) *Although the complainant's beliefs were sincerely held, there was no evidence that veganism speaks to "the meaning of human existence; the purpose of life; theories of humankind's nature or its place in the universe; matters of human life and death; or the exercise of faith. There is no apparent spiritual or otherworldly component to [the complainant's] beliefs . . . [V]eganism . . . reflects a moral and secular, rather than religious, philosophy."*

2) *The complainant's belief system was not sufficiently comprehensive in nature to fall within the provisions of Regulation 7293.1. He did not assert that his belief system derived from a power or being or faith to which all else is subordinate or upon which all else depends.*

3) *There were no formal or external signs of a religion, such as teachers or leaders, services or ceremonies, structure or organization, orders of worship, articles of faith, or holidays.*[33]

Example: The complainant was employed by a large retail store chain as a salesperson in the women's shoe department. She was also "a devout Roman Catholic who regularly attend[ed] church." She learned of a pilgrimage to Yugoslavia where several people claimed that visions of the Virgin Mary appeared to them. The pilgrimage was taking place in October, but the store's policy stated that vacation time would not be granted between October and December due to the holiday season. The store also had a policy of granting unpaid leaves "at management's discretion."

When the complainant's request for unpaid leave was denied, she indicated her intent to embark on the pilgrimage anyway and requested a transfer to another store. The store provided her with the paperwork necessary to request a transfer, instructed her to contact the other stores directly, and cautioned her that when she returned from the pilgrimage, she would not have a job in the store where she had worked for several years. When she returned from Yugoslavia, she inquired about her job and was reminded that she had voluntarily resigned her position. She then claimed that she had been subjected to religious discrimination and

[33] *Friedman v. Southern Cal. Permanente Medical Group* (2002) 102 Cal.App.4th 39.

denied reasonable accommodation. The employer defended on the ground that the complainant did not have a sincerely held religious belief and, even assuming that she did, the accommodation requested would have constituted an undue hardship.

The complainant asserted that she had a "calling from God" to attend the pilgrimage. She testified: "I felt I was called to go . . . I felt that from deep in my heart that I was called. I had to be there at that time. I had to go." She argued that she could not go on the pilgrimage at another time.

The court held that the complainant's religious belief failed to include a "temporal mandate" and, therefore, was not sufficient to establish the existence of the elements of a prima facie case. In other words, the evidence demonstrated that complainant had a sincerely held religious belief that she had to go to Yugoslavia "at some time," but not that she had to go at the specific time in question. Her testimony was only that she "had to go," but no corroborating evidence was introduced showing that her religious beliefs required her to attend in October, such as proof that the visions of the Virgin Mary were "expected to be more intense during that period" or that the Catholic Church instructed her to be there during that time period. Absent such corroborating evidence, the complainant was found merely to have demonstrated a "personal preference" as to the timing of her trip which was not subject to protection under the law. There was no conflict between the complainant's religious belief and the requirements of her employment.[34]

6. Timing of the Evaluation of the Sincerely Held Religious Belief or Observance

Whether or not the employee holds a sincere religious belief or engages in a particular practice related to his/her beliefs is evaluated as of the time when the conflict with the employer's workplace policy or rule arises, not some other date.

Example: An agricultural products company employee believed he was terminated from his employment and denied a reasonable accommodation because of his religion. The employer required that employees live within their assigned sales regions. However, the employee wanted to live in a town with an active Jewish community, which his sales region did not offer. The employee offered to maintain a

[34] *Tiano v. Dillard Dept. Stores, Inc.* (9th Cir. 1998) 139 F.3d 679. The court also found relevant the fact that the complainant did not contact EEOC until after discovering that her ticket for the pilgrimage was nonrefundable, and her travel companion's testimony that the timing of the trip was merely based upon personal preference. Other group tours, scheduled at different times, were available and there was no evidence that the employer had or would deny the complainant's request to use accrued vacation leave at times other than the holiday season.

residence for himself within his sales region while his family lived in another location and/or to bear any additional travel costs incurred because he lived outside the area designated by his employer. The court rejected the employer's assertion that the complainant had previously lived in a community without a significant Jewish population. The complainant was "a recent convert to Judaism, and his children were endeavoring to pursue religious training in that faith. Thus, the growth of the family's faith during the period in question is uncontradicted." His prior practices were irrelevant to resolution of the case.[35]

Example: The complainant was employed by a beef processing plant for nearly three years prior to becoming a Seventh Day Adventist. He worked on Saturdays from the date of his hire until his conversion, at which point he advised the employer's personnel manager that he could no longer work on Saturdays due to his newly-adopted religious belief that the Sabbath must be observed from sunset on Friday to sunset on Saturday. The complainant's pastor sent a confirming letter to the employer. No accommodation was provided to the complainant and he failed to report for work on Saturday on three occasions after which his employment was terminated. Thereafter, the complainant held "a series of jobs, including one for which he was terminated after his refusal to work on Saturdays." Eventually, he attended truck driving school on Friday evenings and accepted employment as truck driver which included driving on Saturdays.

The complainant claimed he had "lost faith" during the time frame after he lost his job with the beef processing plant and before becoming a truck driver. The beef processing plant claimed that the complainant's actions constituted "irrefutable evidence" that his religious beliefs were not sincere at the time it discharged him. The court rejected the argument, concluding that his loss of faith subsequent to the termination of his employment did not prove that his beliefs were insincere at that time.

The sincerity of an employee's religious beliefs "should be measured by the employee's words and conduct at the time the conflict arose between the belief and the employment requirement." The evidence showed that the complainant never worked on Saturday during the period between his adoption of the Seventh Day Adventist faith and his discharge and, in fact, he was discharged from two jobs thereafter because of his determination to honor the Sabbath. It was only after that point in time that he testified that he had lost his faith and began attending truck driving school. The court held that his post-employment loss of faith did not "affect the sincerity of his belief prior to that time."[36]

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[35] *Vetter v. Farmland Industries, Inc.* (1995) 884 F.Supp. 1287.

[36] *U.S. E.E.O.C.v. IBP, Inc.* (1993) 824 F. Supp. 147. [Compare the holding with that of *Hansard v. Johns-Mansville Products Corporation* (1973) 1973 WL 129 (E.D. Tex.), an unreported decision

E. Employer's Knowledge of Employee's Religious Belief or Observance

In order for a violation of the FEHA to have taken place, the employer must have obtained knowledge of the conflict between the employer's neutral workplace rule or policy and the complainant's religious belief or observance. Such knowledge can be obtained either from the complainant or some other source.

1. Information Sufficient to Put Employer on Notice of Employee's Religious Belief or Observance: Employer's Right of Inquiry or to Require Verification

The employee need not provide the employer with a complex explanation of his/her need – it is sufficient if the employee cites a religious connection. Thus, the courts have found an employee's revelation of his/her religious affiliation or belief, or use of terms such as "religious convention" or "religious obligation" sufficient to put the employer on notice of the conflict.[37]

> *Example: In the case of the agricultural products company employee who desired to live in a town with an active Jewish community, discussed above, the court noted that its inquiry into the content of an individual's religious beliefs "is severely limited" and does not include analysis of whether a particular practice is required. The court may only look to see if there is "any connection" between the religion and the belief or practice in question. Stated differently, the court may determine whether the practice is "purely personal, or does indeed have some connection with the [employee's] religion." The requesting employee need only provide the employer with enough evidence to demonstrate that connection. Here, the employee more than met his burden by submitting an affidavit from a rabbi stating that "[l]iving in an active Jewish community with an active synagogue is essential to the sustenance of one's faith as a Jew, so much so it rises to the level of being a mitzvah (Jewish law)."*[38]

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upon which the employer relied. In that case, the complainant was terminated because he refused to work until 7:00 a.m. on Sunday mornings, claiming that he was a New Testament Christian with a "lifelong" conviction against working on Sundays that he had admittedly not always followed. He claimed that he had experienced a resurgence in his religious beliefs after his son experienced a "miraculous improvement" in his health. However, he had worked several Sundays after that event and testified that the reason he agreed to work some Sundays but not others was that on some Sundays he "just didn't have the faith." The court held that he did not make a prima facie showing because he did not demonstrate a sincerely held religious belief or practice, commenting that "the court must determine the individual plaintiff's sincerity in *relying* on those religious beliefs. Hansard's reliance appears to be grounded more in convenience than conviction."]

[37] *California Fair Employment and Housing Commission v. Gemini Aluminum Corporation* (2004) 122 Cal.App.4th 1004, *review denied*.

[38] *Vetter v. Farmland Industries, Inc.* (1995) 884 F.Supp. 1287.

Example: The complainant was a manager at respondent's precision aluminum extrusion plant. He had a perfect attendance record, having never taken any sick leave or personal time off during his 15 months of employment. The complainant had also been a practicing member of the Jehovah's Witnesses faith for more than 25 years. He regularly attended a congregation which took part once each year in a three-day district convention where the teachings of the faith were discussed. The convention began on Friday afternoon and continued throughout the weekend. The complainant had regularly attended the conventions since becoming a member of the faith, i.e., for more than 25 years.

On June 16, the day he learned that year's convention would commence on June 26, the complainant notified his supervisor of his need for time off and the purpose. The respondent's written absenteeism/nonpaid leave policy provided that "any absences required for [nonemergency] reasons . . . must be requested 72 hours in advance with written documentation . . . All requests will not be considered without the written documentation in advance." Unfortunately, the complainant was not aware of respondent's policy and it was not until June 25 that the complainant's supervisor prepared and asked him to sign a memorandum stating that the complainant needed time off to attend a "religious convention with his family members." The complainant's superiors did not believe that he wanted time off work for a religious convention because he had not submitted documentation verifying same. They denied his request for leave, with one supervisor noting that he thought complainant should "grow up" because he was "playing with us."

Respondent argued that its decision-makers did not know "until literally hours before he left" of complainant's religious reason for needing leave. Upon learning that his request had been denied, complainant advised his supervisor that he had made arrangements to attend the convention, including hotel reservations, and would attend as planned. Complainant was not requested by his employer to submit additional written verification of his need for leave. When he returned from the convention, he was issued a "warning" for being absent and subjected to discipline, i.e., a 10-day suspension. Before the suspension period elapsed, complainant's employment was terminated via certified letter which stated, in part, that the "company could not accommodate a nonemergency leave" and "at no time was any documentation presented to substantiate your absence and whereabouts as per company policy."

The respondent violated the FEHA. Respondent's argument that complainant's superiors were unaware complainant was a practicing Jehovah's Witness and had no information about the religious significance of that group's annual conference were unavailing. Complainant's request for time off, made via his supervisor, to attend a

"religious convention" was sufficient to trigger the respondent's duty to initiate steps to explore reasonable accommodation of his religious belief. By notifying his supervisor that he needed leave to go to a religious convention on June 16, complainant provided his employer with notice of the protected nature of his leave request at least 10 days in advance of the date he needed to be absent from work. The knowledge of the supervisor is imputed, as a matter of law, to the remainder of the respondent's decision-makers. Thus, the facts plainly demonstrated that the respondent had knowledge of the conflict between complainant's work schedule and his need for time off to attend the convention.[39]

Example: The complainant was employed as a delivery truck driver who was threatened with termination unless he trimmed his dreadlocks. It was his practice to tuck the dreadlocks into the cap he was required to wear as part of his uniform which made it bulge out. Prior to receiving that instruction, the complainant had not revealed to his employer that he wore the dreadlocks because of a "religious belief. God instructed [him] in a dream, [he alleged], to grow dreadlocks so as to embody the values held by Jesus. The Book of Revelations, he [claimed], described Jesus as wearing his hair like 'wool.'" Shortly after requesting a reasonable accommodation of his religious belief and practice, he commenced a Workers' Compensation leave. His employment was not terminated nor was any other adverse action taken against him. In fact, the employer expressed its willingness to engage in an interactive process with him to design and implement a reasonable accommodation. The complainant had not returned from the Workers' Compensation leave at the time he filed a complaint alleging he had been subjected to discrimination because of his religion.

To demonstrate a prima facie case, it must be established that the employer was aware of the employee's religious belief and, with that knowledge, subjected the employee to an adverse employment action because of the conflict between the employee's religious belief and an employment requirement. The threat of termination is not an adverse employment action.

Therefore, the complainant was not subjected to an adverse employment action since the terms and conditions of his employment were not changed by the employer.

Moreover, the employer's directive to the employee concerning his dreadlocks was issued with no knowledge of the relationship between his hair and his underlying religious belief. Therefore, the employer "could not have made the threat due to any conflict between [the complainant's] religious practices and a [company] work requirement." There was no

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[39] *Ibid.*

causal connection between the threatened termination of the complainant's employment and his religious belief or practice.[40]

2. Information Sufficient to Put Collective Bargaining Unit on Notice of Member's Religious Belief or Observance: Union's Right of Inquiry or to Require Verification

The analysis is slightly different, however, when dealing with a union or collective bargaining unit. In that instance, at least one court found it acceptable to require an employee to submit independent corroboration of his/her sincerely held religious belief while still severely limiting the union's right of inquiry.

It must be borne in mind, however, that when dealing with a collective bargaining agreement, the court must balance the right of the member requesting some form of reasonable accommodation against the rights of the other members. The rights in question are bargained for and contractual in nature.

Example: An employee at an automobile manufacturing plant who was a member of a collective bargaining unit learned that he had a right to resign from membership and cancel his union dues to become a "religious objector," i.e., an individual who holds sincere religious beliefs that preclude him/her from being a member of or supporting a union. Religious objectors were required to pay to a charity an amount equivalent to that paid by members for dues. The union had a policy of requiring any person seeking to be designated a "religious objector" to submit independent corroboration of the religious conviction that barred him/her from being a member of or financially supporting the union. The complainant refused to provide corroboration. The union was flexible as to the type of evidence it would accept, telling the employee that he did not have to complete a particular "certificate" or provide information from an elder, priest or pastor. The union merely sought verification "from some reliable person other than you" with personal knowledge of the complainant's sincerely held religious belief. The complainant claimed that the union denied him a reasonable accommodation, arguing that the union's request for independent corroboration was a masked attempt to require him to be a member of an official religion that objects to funding unions.

The question before the court was whether or not a union has a right to inquire into the sincerity of a member's beliefs when the union believes that the member's motivation for requesting "religious objector" status might be insincere, political or a personal preference rather than a religious belief. The union asserted that it was entitled to determine

[40] *Lewis v. United Parcel Service, Inc.* (2005) WL 2596448.

whether the complainant was a member of a protected class and the "independent corroboration" requirement was a simple and unintrusive means of ascertaining same. The court observed that no duty to accommodate arises until it has been established that an employee's belief is both religiously motivated and sincere. If the union had no right to inquire into an employee's beliefs, its "hands would be tied so that any member's self-serving statement that he had sincere religious beliefs that conflict with a job requirement would have to be accommodated unless such accommodation posed an undue hardship to the union." The court held that the complainant's assertion that the union should simply have accommodated him would eliminate a key legal component, i.e., the requirement that the employee seeking accommodation bear the burden of showing that he/she holds a sincere religious belief that conflicts with a union requirement. Therefore, the burden remained upon the complainant to provide evidentiary support for his request.

The union's right of inquiry was limited, however, and it was "not the union's right to determine what is or is not a valid religious belief or practice. The union was only permitted to satisfy itself that the member is 'sincere' and that the belief is 'religious' under the broad definition of that term as provided in [the law] and no more."[41]

3. Employee's Failure to Notify Employer Does Not Trigger the FEHA's Protections

An employer cannot be held responsible for not resolving a conflict between its workplace rules and an employee's religious belief or observance of which it is entirely unaware. The employee bears the burden of demonstrating, as part of the prima facie case, that the employer had knowledge of his/her sincerely held religious belief or observance.

Example: Complainant had just begun work as the executive housekeeper of a newly opened hotel. His duties included assuring that "a copy of the Bible, supplied free of charge to the hotel by the Gideons, was placed in every room." When a new hotel opened, it was customary for a representative from the Gideons to meet with a member of the hotel's management staff to deliver the Bibles. The manager of the hotel asked the complainant to join him for the meeting, joking that "they were going to 'pray with the Gideons.'" The complainant voiced no objection to attending the meeting. "But, to the manager's surprise, at the meeting the Gideons, besides delivering Bibles, did some Bible reading and some praying. [The complainant] was offended by the religious character of the meeting and left in the middle, to the manager's chagrin." Later, the manager counseled the complainant, admonishing him never to walk out

[41] *Bushouse v. Local Union 2209, United Auto., Aerospace & Agricultural Implement Workers of America* (2001) 164 F.Supp.2d 1066.

of a meeting in that fashion again. In response, the complainant stated, "You can't compel me to a religious event." The manager's reply emphasized that the complainant was to take direction from him. The complainant responded, "oh, hell no, you won't, not when it comes to my spirituality." The complainant's employment was terminated for insubordination and he filed suit, claiming he was subjected to discrimination on the basis of religion and denied a reasonable accommodation.

The court's written decision reflects its exasperation with the complainant, who refused, even during his deposition, to identify "what if any religious affiliation or beliefs (or nonbeliefs) he has; refused even to deny that he might be a Gideon! His position was that [the law] forbids an employer to require an employee to attend a religious meeting, period." The court concluded that the manager was indifferent to the complainant's religious views because the complainant never expressed them. Therefore, the termination of his employment was based solely upon the fact that he embarrassed the manager by hastily exiting the meeting: The manager "would be in trouble with his superiors if the Gideons became huffy and cut off the supply of free Bibles to [area] hotels, and also because [complainant's] refusal to see the manager's point of view indicated that he was unlikely to be a cooperative employee."[42]

F. Adverse Employment Action

The conflict between the complainant's religious belief or observance and the employer's work requirement may result in the complainant suffering an adverse employment action.

Alternatively, an adverse employment action must have been threatened by the employer or the employee must have believed that, following the employer's denial of his/her request for reasonable accommodation, he/she would be subjected to an adverse action if he/she did not comply with the employer's rules, policies or procedures. For instance, an employee who is denied a reasonable accommodation in the form of a modified work schedule must reasonably believe that a failure to report to work as scheduled by his/her employer will result in adverse action being taken against him/her.

<u>Example</u>: The complainant had been employed for ten years as the carryout counter manager of a restaurant, delicatessen, and catering facility ("the deli"). Among the deli's busiest times of the year was the Jewish holiday Yom Kippur for which it sold many deli trays to customers observing the holiday. Deli employees were required to work overtime in order to prepare the trays. When the deli owner and complainant disagreed about the plan to complete the trays in a timely manner, the owner informed the complainant that he would have to

[42] *Reed v. Great Lakes Companies, Inc.* (7th Cir. 2003) 330 F.3d 931.

work overtime to prepare the trays himself. The complainant refused on the ground that he was Jewish and working overtime would cause him to miss Yom Kippur services, at which time the owner terminated the complainant's employment. Two other employees worked overtime to complete preparation of the trays. The complainant asserted that he had been subjected to religious discrimination.

The court found that the employee demonstrated a prima facie case:

- *He had a sincere religious belief in Judaism. The deli owner's argument that the complainant did not observe all Jewish holidays and had, in past years, worked overtime to prepare deli trays for Yom Kippur, was rejected. The court refused to closely scrutinize the extent to which the complainant celebrated other holidays or his knowledge about Judaism in general, noting that "it is not necessary that this court find plaintiff to be devout in his observance of all aspects of Judaism. It is enough that plaintiff has attended Yom Kippur services in the past and wanted to attend . . ."*

- *The complainant's desire to attend services conflicted with the deli owner's mandate that on the afternoon of the day prior to the holiday the complainant prepare the trays himself. The deli owner argued that he never told the complainant he could not attend services, but a reasonable fact finder could conclude that his statements amounted to his telling the complainant that he could not attend.*

- *The complainant informed his employer of the conflict between his religious practice and work requirements.*

- *The complainant suffered an adverse employment action, i.e., termination of his employment as a result of his failure to comply with the conflicting employment requirement. His termination came immediately after he informed the deli owner that he would not work overtime.*[43]

Example: In the case of the member and minister in the World Church of the Creator, discussed above, the court found that the letter forwarded by the employer to the complainant, informing him of his demotion, constituted an admission that the complainant was demoted because of his membership in the group and white supremacist beliefs. There was no basis upon which the court could conclude that the complainant was demoted as a result of having committed racially discriminatory acts or that such acts formed the basis for the complainant's demotion.[44]

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[43] *Shpargel v. Stage & Co.* (1996) 914 F.Supp. 1468.
[44] *Peterson v. Wilmur Communications, Inc*. (2002) 205 F.Supp.2d 1014.

1. Pretext: Same Decision-Maker

As noted above, in order to establish a prima facie case of disparate treatment because of religion, it must be demonstrated that the employer knew of the complainant's religious beliefs *prior to* taking an adverse action against him/her. When a basis *other than* religion is the claimed basis for disparate treatment, the courts have frequently adopted the inference that if the same person was responsible both for hiring and firing the complainant, it is likely that the adverse action (termination) was not motivated by a desire to discriminate.[45]

The employee's religious belief, observance or practice may come to the attention of the employer at the time of hire, but frequently does not become known to the employer until the employment relationship is well under way. Therefore, the presumption that discrimination did not occur when the same decision-maker(s) both hired and took an adverse action against the employee is not as strong in religious discrimination cases as when examining other types of claims. If the facts support its application, however, the courts will apply the inference on a limited basis.

> *Example: The complainant, "an adherent to the Jewish religion" who had converted a few months earlier, claimed that he was terminated from his employment with an agricultural products company when he refused to live within his sales territory and denied a reasonable accommodation of his religious beliefs, i.e., permission from the company to live outside the territory in order to be in a city with an active Jewish Community. He claimed that he was treated differently than other employees who were not required to live within a specific geographic area, and that the employer instituted the policy and only determined to enforce it in his case after learning that he was Jewish. The same individual both hired and fired the complainant, and the decision-maker did not know of the complainant's religious beliefs at the time of hiring.*
>
> *The complainant asserted that "everything about his relationship with [the decision-maker] changed once he informed [the decision-maker] of his religious affiliation.*
>
> *Therefore, the court refused to employ the presumption that religion was not a motivating factor because the same person made the decision to hire and fire the complainant. The court also noted that if the residency requirement was only developed after the complainant revealed his desire to live in a different location and the reason for his request (religion), the fact that the employer provided inconsistent and changing reasons for terminating his employment, as well as its description of the acceptable geographic boundaries, might reveal that the residency requirement, its*

[45] *Vetter v. Farmland Industries, Inc.* (1995) 884 F.Supp. 1287, 1303.

application to the complainant, and his firing were a pretext for religious discrimination. Additional relevant information would include whether any other employees had violated the residency requirement and, if so, what discipline, if any, they were subjected to, as well as how long they were given to locate and obtain suitable housing as compared to the mere 30 days given complainant. Finally, the decision-maker's alleged comment to the complainant's wife, "Sometimes you have to choose between your religion and your job," could lead a trier of fact to conclude "the requirement that [the complainant] live within his trade area was either intended or understood to present [him] with an unpalatable choice because of his religion."[46]

Example: A university professor contended that she was denied tenure because she was Jewish. The university asserted legitimate, nondiscriminatory reasons for the denial, including the fact that the professor's colleagues found her uninspiring as an art teacher, uncooperative as a colleague, unable to accept criticism, and unlikely to be able to improve her performance. Additionally, "academic politics" played a role in the denial.

The court found that even though the university's proffered reasons for the denial were suspect, the evidence did not support a finding that the employment decision was motivated by the professor's religion. In particular, the court observed that the dean of the university initially supported the professor's tenure bid, but later changed his position. "[W]here the same actor is responsible for both the hiring and firing of a discrimination plaintiff, . . . a[n] . . . inference arises that there was no discriminatory motive." The professor demonstrated that her fellow faculty members, who recommended she not be granted tenure, were "prejudiced" against her, but made no showing that the prejudice arose out of anti-Semitism.

The only evidence of an anti-Semitic animus offered by the professor was the fact that a faculty retreat was scheduled on the Jewish high holidays, but she was excused by the university from attending and there was no evidence that she was disadvantaged in any way by missing the retreat. Likewise, the professor was not required to teach on the high holidays. Lastly, the isolated comments attributed to another faculty member who was not involved in the adverse employment decision were given no weight by the court. The court held that the act of scheduling the retreat on the high holidays was, by itself, insufficient to show that the university's decision-makers harbored a discriminatory animus. [47]

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[46] *Vetter v. Farmland Industries, Inc.* (1995) 884 F.Supp. 1287.
[47] *Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147.

Example: An Orthodox Jewish physician contended that his employment was terminated by the hospital where he worked as a pediatrician in retaliation for his having "complained repeatedly about being scheduled to work or to be on-call in the pediatric neurology department during Jewish Sabbaths and religious holidays." The hospital defended on the ground that the complainant's employment was terminated due to restructuring necessitated by a financial crisis and because of his unsatisfactory relationships with staff members and colleagues.

The only evidence offered in support of the complainant's claim was the fact that about one year after terminating his employment, the hospital created another full-time position for a neurologist. The court found it insufficient to support a conclusion that the complainant's assertion of his religious beliefs was at least one factor in the decision to terminate his employment. Pretext is not shown through "mere speculation and conjecture."[48]

2. Pretext: Collective Bargaining Unit

Example: The complainant, a certificated employee of a school district, claimed that she was subjected to disparate treatment because of her status as a "religious objector." Under the terms of the controlling collective bargaining agreement, employees were in one of three groups: union members, agency fee payers, or religious objectors. Members paid full dues, while fee payers were given the right to object to union expenditures on religious, ideological or political bases and have the amount of dues they paid reduced accordingly. Religious objectors made no payment directly to the union, but, rather, paid the equivalent of the full amount of annual dues to a charitable organization of their choice. Thus, religious objectors and members paid the same amount, while the agency fee payers paid a reduced amount. The complainant contended that she should be allowed to contribute to a charitable organization the same reduced amount as the agency fee payers. She claimed that agency fee payers and religious objectors were similarly situated and by being required to donate an amount equivalent to the full annual dues paid by members, religious objectors were subjected to disparate treatment because of religion.

The court rejected the complainant's argument, ruling that agency fee payers and religious objectors were not similarly situated because agency fee payers made payments directly to the union, albeit in a reduced amount, while religious objectors paid nothing at all to the union. Additionally, fee payers did not object to union membership per se, but only to some of the uses of dues collected. Moreover, if religious objectors were allowed to pay the same reduced amount as agency fee payers, they would be treated more favorably

[48] *Zacharowicz v. Nassau Health Care Corporation* (2006) 177 Fed.Appx. 152. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

than other school district employees while receiving the same benefits of union membership. Under the existing payment system, members of the union and agency fee payers financed the benefits provided to religious objectors. Therefore, to grant the complainant the additional benefit she sought would impose a disproportionate hardship upon the members and agency fee payers.[49]

G. Failure to Provide Reasonable Accommodation

Under the FEHA, it is an unlawful employment practice to discriminate:

> . . . against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer or other entity covered by this part . . .[50]

Although the following list is not exhaustive, case law reveals that the five most common reasons why employees request reasonable accommodation from their employer are:

- Observance of the Sabbath conflicts with the employee's work schedule.
- Observance of specific religious holiday(s) conflicts with the employee's work schedule.
- Performance of specific task(s) conflict with the employee's sincerely held religious belief.
- Adherence to the employer's dress or grooming standards conflicts with the employee's sincerely held religious belief.
- Membership in or the payment of membership dues to a union or collective bargaining unit conflicts with the employee's sincerely held religious belief.

Examples of reasonable accommodation include, but are not limited to:

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[49] *Madsen v. Associated Chino Teachers* (2004) 317 F. Supp.2d 1175.
[50] Gov. Code, § 12940, subd. (l).

- Having other employees substitute for the employee who needs an accommodation by working his/her shift or hours;

- Relieving the employee seeking accommodation from performing specified duties which conflict with his/her religious belief(s);

- Granting the employee time off work, including any reasonable time necessary for travel, for his/her religious observance;

- Hiring another employee to perform specific duties in place of the employee who needs an accommodation;

- Transferring the employee who requests accommodation to another position, job classification, job site/location.

- Modifying workplace practices, policies or rules, including, but not limited to dress or grooming standards.

  Example: The complainant was enrolled in an apprenticeship program leading to certification as a journeyman electrician. The Joint Apprenticeship Training Council (JATC) which administered the program adopted a policy of requiring all third- and fourth-year apprentices to complete an assignment at a nuclear power generating plant. The complainant sought an exemption based upon his religious beliefs. Specifically, complainant was a "devout Roman Catholic, whose studies of the issues of nuclear power led him to reasonably conclude commercial nuclear power threatens the environment and future generations." The Catholic priest from the complainant's congregation testified that it would be a sin for a Catholic with complainant's knowledge and opinions on the subject of nuclear power to accept the assignment. Nonetheless, the JATC denied the complainant's request for accommodation, suspended him for 60 days and terminated his participation in the apprenticeship program. The JATC further contended that it possessed discretion to reject complainant's request in order to balance the interests of the apprenticeship program against the wishes of individual apprentices and because it was not imposing upon complainant an undue risk to his health and safety.

  The JATC violated the FEHA. The complainant's sincerely held religious belief entitled him to a reasonable accommodation. Instead, the JATC "attempted to force him to commit a sin as a precondition of pursuing his chosen profession." The complainant could have received comparable training at a different work site.[51]

[51] *Best v. California Apprenticeship Council* (1984) 161 Cal.App.3d 626, rehrg. denied.

Example: A licensed psychologist employed by a correctional facility claimed that he was discriminated against and denied accommodation because of his religion, Islam. He had been a practicing Muslim for more than 20 years. Islam requires that believers pray five times each day, eat only "Halal" or kosher meat, and follow specific bathing practices, all of which the complainant observed. Additionally, Muslims are required to attend the Jummah, congregational prayer that begins each Friday at approximately noon to 1:15 p.m. and lasts for 90 minutes to two hours. If a Muslim misses Jummah prayer three times, he/she is considered a nonbeliever. And if a Muslim's hours of employment conflict with the Jummah, the Islamic faith requires the individual to find another job. Complainant's employer initially approved his request to work a 4.5 day workweek which would give him Friday afternoons off in order to attend the Jummah. A few months later, the employer instituted a Friday afternoon "psych line" during which incoming inmates were screened for mental disorders. The employer began assigning complainant to the "psych line" rotation, but complainant traded shifts with other employees. Shortly after stating that "everything appears to be going rather well," complainant's supervisor informed him that the "operational needs" of the facility were changing and continuing to accommodate his religious beliefs would be an undue burden. Respondent intended to treat all employees equally, thus, complainant's schedule would be changed to an 8-hour-per-day, five-day-per-week schedule. Respondent also asserted that it had received complaints from complainant's co-workers about his "special privileges." Complainant's attempts to explain the seriousness of his religious beliefs and the fact that he would have to resign his employment if he were not granted a reasonable accommodation elicited snickering from his superiors. His appeals were unsuccessful.

Complainant felt that he had no choice but to continue trading shifts with other employees until he could secure new employment. When his behavior came to the attention of his superiors, he received a "Letter of Instruction," reprimanding him for working "an unauthorized" schedule. He was ordered to "cease" his "willful disobedience" and obtain authorization from his supervisor for any deviation from his assigned work schedule. Complainant left his employment upon accepting another position in a different facility.

The respondent violated the FEHA by failing to provide complainant a reasonable accommodation. Complainant had a bona fide religious need to attend the Jummah which conflicted with respondent's work requirements, i.e., that the "psych line" be staffed on Friday afternoons. The respondent was aware of complainant's need for accommodation, yet failed to provide it and took adverse action against complainant when he traded shifts with other employees. The complainant was constructively discharged from his employment. He was forced to resign to engage in the practices required by his sincerely held religious beliefs.[52]

[52] *DFEH v. California Department of Corrections* (1997) FEHC Dec. No. 97-10.

Example: The complainant, a Muslim woman who immigrated to the United States from Somalia, was employed as a rental agent for a rental car company. In that capacity, she deals with members of the public. The company established a "Dress Smart Policy" to promote a "favorable first impression with customers, and expressly prohibited employees from wearing certain clothing and accessories, for example, the wearing of more than one earring, open toe shoes, and half-grown beards." Additionally, the company contended that its policy forbid employees to wear any "garment or item of outer clothing not specifically mentioned in the policy . . ."

The complainant requested permission to wear a head covering in the workplace during the Ramadan holiday. The company granted her request but only when not at the rental counter dealing with customers. Additionally, the complainant was not excused from working at the rental counter during Ramadan. When the complainant nonetheless reported to work wearing a head covering, she was issued several "Counseling Review" memos, sent home from work and, on the third occasion, suspended pending an investigation. The company terminated her employment and noted in its file that she was not eligible for re-hire.

*The court rejected the company's assertion that "any deviation from [its] carefully cultivated image is a definite burden" in part because it failed to introduce any evidence showing that the cost of providing a reasonable accommodation to the complainant would be more than de minimis (*so minor as to be disregarded.) *Rather, the court concluded that the company supported its argument only with "speculation" that granting her request would have "opened the floodgates to others violating the uniform policy." The courts have uniformly held that the "if we allow one person to deviate from the company policy, then we would need to allow everybody to deviate from the policy" argument is unavailing. Under such "faulty reasoning, virtually no accommodation could overcome the undue hardship test." The company was found liable for failing to grant the complainant's request for a reasonable accommodation.*[53]

Example: The complainant was a Rastafarian who, because of his religious beliefs, did not shave or cut his hair. He was employed as a lube technician for an oil change service chain, working in both the upper and lower bays of the shop area, greeting customers and discussing services and products with them. When the employer implemented a new personal appearance policy requiring all employees to be clean shaven, the complainant explained he could not comply due to his religious beliefs and practices. In response, the employer advised him he could not have any contact with customers and would work exclusively in the lower bay, although his pay rate would remain the same.

[53] *E.E.O.C. v. Alamo Rent-A-Car LLC* (2006) 432 F.Supp.2d 1006.

The complainant contended that he was subjected to discrimination because the lower bay provided inferior working conditions. Specifically, he was frequently assigned to work there alone and could not take break and it was extremely cold during the winter. On several occasions, he hurt his head and was burned by oil. He received a pay raise based on merit shortly after being reassigned.

The court opined that a reasonable jury could conclude the complainant suffered an adverse employment action when he was transferred to a "less desirable work environment" even though the transfer was "purely lateral." Employers cannot transfer employees who assert their religious beliefs to "unappealing work environments without 'adversely' affecting the conditions of their employment. Pay scales and formal job titles are only part of the conditions of a job; anyone who has worked knows that opportunities for variety in day-to-day tasks and reasonably palatable physical surroundings may make the difference between a tolerable and a flatly unbearable working environment."

Moreover, a jury could find that the complainant was denied a reasonable accommodation because the employer's solution "restricted [the complainant] to a cold, uncomfortable, isolated work site, with significantly diminished responsibilities, as the price of maintaining his bona fide religious practice."[54]

Example: The complainant was employed in the deli department of a discount chain store. At the time she was hired, she had 11 ear piercings and four tattoos on her upper arms that she concealed under her clothing. She pierced her eyebrow and, over the course of the next two years or so, "engaged in the practices of tattooing, piercing, cutting, and scarification, though not as part of any sectarian religious practice or belief." Thereafter, she joined the Church of Body Modification (CBM) whose members "believe that the practice of body modification and body manipulation strengthens the bond between mind, body, and soul, thus ensuring that adherents live as spiritually complete and healthy individuals." The complainant interpreted the church's teachings as "requiring her to display her body modifications at all times," although the church's website and publication did not demonstrate that such was an official tenet of the group's beliefs.

The employer's new grooming policy forbid "facial or tongue jewelry." When her supervisor directed her to remove her facial piercings, the complainant did not initially disclose that they were related to a religious belief or practice. However, after a co-worker revealed to management that she and the complainant were members of the CBM, the complainant provided written documents taken from the organization's website. In conversation with her supervisor, she offered to wear a band-aid over her jewelry rather than remove it, but the supervisor rejected that suggestion. From that date forward, the

[54] *Brown v. F.L. Roberts & Co., Inc.* (2006) 419 F.Supp.2d 7.

complainant did not report for any of her scheduled shift which resulted in the termination of her employment. When she filed a complaint alleging religious discrimination, the employer took the position that CBM was not a religion and, even it were, there was no evidence that the complainant was required, according to its doctrine, to wear her facial jewelry at all times. In order to resolve the matter, the employer offered the complainant the opportunity to return to work if she otherwise complied with the store's dress policy and wore a band-aid over or retainer in place of the jewelry. She refused, even though the offered accommodation was exactly what she had suggested prior to her termination.

Noting that the law does not "permit an employee to [elevate to the level of a religious tenet] a dress or grooming preference, merely upon his or her own say-so," the court concluded that even if, over the employer's strenuous objection, it deemed CBM a bona fide religion, its written materials did not support the complainant's contention that she was required to display her facial piercings at all times. The employer's offer of accommodation was "manifestly reasonable as a matter of law. The temporary covering of [the complainant's] facial piercings during working hours impinges on [her] religious scruples no more than the wearing of a blouse, which covers [her] tattoos," a matter about which she voiced no complaint. The alternative offered, a clear plastic retainer placed over the piercings, did not even require her to cover them.

The court acknowledged the employer's "legitimate interest in presenting a workforce to its customers that is, at least in [its] eyes, reasonably professional in appearance. The [employer's] proffered accommodation reasonably respected the [complainant's] expressed religious beliefs while protecting this interest. In contrast, the [complainant], after backing off from her original proposal, has offered no accommodation whatsoever, insisting instead that the [employer] may not limit her piercings in any way, either in nature or number, without compelling her to disregard her religious scruples and thereby violating [the FEHA]. [The law] does not demand that this reasonable accommodation be favored, or even accepted, by [the complainant]. So long as the accommodation reasonably balances the employee's observance of her religion with the employer's legitimate interest, it must be deemed acceptable."[55]

When several alternative reasonable accommodations are available, the employer has the right to select and implement the accommodation that will *least* disadvantage the employee with regard to his/her employment benefits such as compensation.[56] Stated differently, the employer is obligated to attempt to remove the work-rule conflict without diminishing the employee's status or opportunities.

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[55] *Cloutier v. Costco Wholesale* (2004) 311 F.Supp.2d 190.

[56] *DFEH v. Union School District* (1980) FEHC Dec. No. 80-32. ["Employment benefit" is defined as "any benefit of employment covered by the Act, including hiring, employment, promotion, selection for training programs leading to employment or promotions, freedom from disbarment or

Example: The complainant was a mechanic in an underground coal mine, as well as a member and Sunday school teacher at a Baptist Church, the official doctrine of which prohibited all officers and teachers from working on Sundays. Therefore, he believed it was morally wrong to work on Sundays unless a life-threatening situation required it. He explained his convictions during his job interview and initially worked the third shirt which began at 11:00 p.m. on Sundays. However, about a year later, the company implemented a new work schedule that required all employees to work approximately twenty-six Sundays per year. Any employees who objected to working on Sundays were allowed to trade shifts with other employees. Only if the employee could not find another employee willing to trade shifts with him/her was he/she allowed to bring the issue to the attention of the supervisor and, as needed, further "up the chain of command" to the company's president, in accordance with the company's "Open Door Policy."

The complainant notified his supervisor that he would not report to work on Sunday because he would be going to church. After amassing two "unexcused absences," the complainant asked a couple of employees to swap shifts with him, but "decided it was wrong for him personally to ask someone to swap with him since he was, in effect, asking that person to sin. [He], however, was willing to work in a swap arranged by the company." After his third "unexcused absence," his employment was terminated, despite requesting that he be allowed to work additional days without overtime to make up for being absent on Sundays or transferred to a "surface job" that would not require him to work on Sundays.

Generally, the employee must cooperate with his/her employer to determine the feasibility of and implement the reasonable accommodation that he/she has requested. A revised work schedule is a typical reasonable accommodation of a conflict between an employee's work schedule and religious belief/observance which must sometimes be accomplished by requesting that another employee trade shifts with the employee who needs an accommodation. "However, where an employee sincerely believes that working on Sunday is morally wrong and that it is a sin to try to induce another to work in his stead, then an employer's attempt at accommodation that requires the employee to seek his own replacement is not reasonable."

The employer was unable to demonstrate that requiring it to find an employee willing to exchange shifts with the complainant would impose an undue hardship upon it. The company could have used its monthly newspaper, bulletin boards or human resources personnel to solicit volunteers.

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discharge from employment or a training program, compensation, provision of a discrimination-free workplace, and any other favorable term, condition or privilege of employment." (Cal. Code Regs., tit. 2, § 7286.5, subd. (f).)]

Accordingly, it failed to live up to its obligation to provide a reasonable accommodation.[57]

1. Provision of "Reasonable" Accommodation Sufficient

The employee is entitled only to a "reasonable," not an "ideal" accommodation. If several different forms of reasonable accommodation are available/possible, is the employer obligated to allow the employee to pick which accommodation will be implemented? No.

> *Example: The complainant was a member of the Worldwide Church of God and a Sabbatarian (one who observes the Sabbath from sundown on Friday to sundown on Saturday). He also observed other religious holidays such as Passover and the Feast of Trumpets. He was employed intermittently as a temporary carpenter for a school district. On several occasions, district employees were offered the opportunity to work overtime on Saturday, but the complainant declined due to his observance of the Sabbath. He offered to work overtime on Sunday instead, at the same rate of compensation paid to the other employees who worked on Saturday. The district refused his offer because the applicable collective bargaining agreement required the payment of double time when employees worked on Sunday, special permission to work on Sunday was required but rarely granted, district buildings were normally closed on Sundays and another employee would have to grant the complainant access and remain on the premises with the complainant for safety and security reasons. That employee would have to be paid double time in accordance with the collective bargaining agreement. Because he did not celebrate Christmas Day or New Year's Day, the complainant also asked that he be allowed to work on those days, but the board declined for the same reasons. The complainant claimed that he was denied a reasonable accommodation of his religious beliefs. The board defended by showing that the complainant was always granted the time off that he requested for religious observances and suffered no adverse consequences.*
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> *The court concluded that the board had not failed to reasonably accommodate the complainant. An employer is only required to provide a reasonable accommodation. It is not required to accommodate the employee in the way the employee finds to be most desirable. The complainant was never promised or guaranteed overtime and even if he did not have an opportunity to work as much overtime as other employees, "that is insufficient to make out a reasonable accommodation claim." The United States Supreme Court has ruled that "[t]he provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy*

[57] *Smith v. Pyro Min. Co.* (6th Cir. 1987) 827 F.2d 1081.

days and requires him only to give up compensation for a day that he did not in fact work."[58]

2. Employer Must Grant Accommodation(s) Addressing All Bases for Request

If the employee has two bases upon which he/she requests a reasonable accommodation or, stated differently, asserts two different objections to the employer's workplace policy/policies or rule(s), the employer has an obligation to make a good faith effort to accommodate both.

Example: A full-time sales associate at a home improvement store worked a flexible schedule, including evenings, weekends, and any day of the week. He was guaranteed a forty-hour work week and received benefits, including health insurance. Along with his fiancée, he attended church services and pre-marital counseling which caused him to become "fully aware of the importance of the Sabbath" and the Biblical "requirement that all work cease on the Sabbath." He advised his employer that he had come to believe that Sunday is to be "a day of rest and meditation" and strict observance of the Sabbath an absolute requirement of his faith. Thus, he informed his employer that he could no longer work on Sundays, but was available to work any other day.

For more than one year, his employer granted the reasonable accommodation he requested. However, a new store manager advised him that he "needed to be fully flexible and if he could not work on Sundays then he could not work there." She asked the employee if he attended church on Sundays. Upon learning that he did, she offered him the opportunity to work a late shift that would allow for his church attendance. The employee declined, explaining that it was his belief and a requirement of his religion that he "could not work at all on Sundays." When the manager persisted in scheduling him to work on Sundays, and he did not report to work, his employment was terminated because of unexcused absences.

The employer violated the FEHA by failing to grant the employee a reasonable accommodation of his religious belief and practice. The offer of a later-starting shift accommodated only one of the employee's concerns, i.e., that of missing church service on Sunday morning, but did not address his principle objection to working at all on Sunday. An employer does not fulfill its obligation to reasonably accommodate a religious belief when it is confronted with two religious objections from the

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[58] *Creusere v. Board of Education of the City School District of the City of Cincinnati* (2003) 88 Fed.Appx. 813. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

employee but only offers an accommodation which addresses one of those objections, while completely ignoring the other.[59]

Example: In the case of the beef processing plant employee, discussed above, whose employment was terminated when he failed to report to work on Saturday on three occasions after informing his employer that he had become a Seventh Day Adventist, the complainant also informed his employer that he considered it a sin to ask someone else to work for him on the Sabbath. He could, however, consistent with his beliefs, allow his employer to arrange a shift swap for him. The employer offered to accommodate the complainant by allowing him to trade shifts with a co-worker or transfer him to a different position until he was able to secure a replacement. Although the courts generally view an employer's offer to allow an employee requesting accommodation to arrange his/her own shift trade, they have also held that if an employee asserts more than one religious belief which conflicts with work requirements, the employer must endeavor to accommodate both beliefs. Thus, the beef processing plant was obligated not only to excuse the complainant from working on Saturday, but also to accommodate his belief that he could not ask another employee to work on Saturday. (The employer bore the burden of showing that it could not solicit and obtain replacements for the complainant without undue hardship.)[60]

H. Workplace Proselytizing and Harassment

Employees have a right not to be subjected to a work environment that is "permeated with discriminatory intimidation, ridicule, and insults," such that it is sufficiently severe or pervasive to alter the conditions of the employment and create an abusive or toxic work environment. The work environment will be judged by the reasonable person standard. In other words, the court will inquire whether a reasonable person, similarly situated, would have perceived the work environment to be hostile.

1. By the Employer

An employer is not completely prohibited from expressing or discussing religious beliefs and practices in the workplace and/or inviting employees to participate in religious discussions and/or activities. However, employers run afoul of both State and federal law when employee participation in discussions and activities cease to be *voluntary* and are either actually or perceived by employees to be *mandatory*.

Additionally, an employer cannot discriminate against its employees by providing better terms, conditions, and benefits of employment to those

[59] *Baker v. The Home Depot* (2nd Cir. 2006) 445 F.3d 541.
[60] *U.S. E.E.O.C. v. IBP, Inc.* (1993) 824 F. Supp. 147.

employees who either accept invitations to participate in religious discussions and/or activities or demonstrate agreement with an employer's expressed religious beliefs and/or practices than to those employees who decline or express disagreement.

An employee cannot be asked to waive the rights assured to him/her under the FEHA by signing an employment contract, employee handbook/ guidelines, acknowledgment of receipt of employee rules/regulations, or similarly-entitled documents.

> *Example*: *A manufacturer of mining equipment held weekly devotional services at its plants. All employees were required to attend the 30 to 45 minute sessions which included prayer, singing, testimony, Scripture readings, and discussions of business-related matters. Employees were paid for the time they spent attending the devotionals and a failure to attend was regarded by the company as equivalent to not showing up for work. The company's employee handbook, distributed to all employees, contained the following verbiage: "All employees are required to attend the nondenominational devotional services each Tuesday. Employees are paid for their time while attending these services." All employees were required to sign a statement acknowledging receipt of the handbook and promising to abide by the employer's rules as a condition of continued employment.*
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> *The company asserted the verbiage and required employee signature in support of its argument that it did not have to allow an employee to be excused from the devotionals as a reasonable accommodation of his religious beliefs (Atheism). However, the court rejected the company's argument, finding that to allow such a waiver of the employee's rights would undermine the public policy of eradicating discrimination in employment.*[61]
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> *Example: The complainant alleged that she was subjected to workplace harassment on the basis of religion because she was subjected to unwelcome religious comments and invitations to attend church which made her work environment hostile. Specifically, complainant stated that her supervisor and co-worker discussed their personal lives, including their religious beliefs and lifestyles, in complainant's presence and commented about persons with whom they were acquainted that they felt were not leading "good Christian lives." Upon learning that complainant lived with her boyfriend and drank alcohol, her co-worker stated that such practices were against her "religious beliefs."*
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> *Complainant felt that the remarks were disparaging. Further, complainant's supervisor invited complainant to attend church and church*

[61] *E.E.O.C. v. Townley Engineering & Mfg. Co. (9th Cir. 1988) 859 F.2d 610, cert. denied*.

functions with her on several occasions, telling complainant with regard to which church she should attend that "It doesn't matter which church you go to as long as you go." Although neither complainant nor her fellow employees were required to attend church as a condition of continued employment, the complainant alleged that the comments and invitations were offensive, upsetting, and made her feel like an outsider.

The FEHC observed that "epithets, derogatory comments or slurs" such as comments disparaging an employee's religion are prohibited by the FEHA. General religious talk among employees in the workplace is not unlawful, nor are invitations to attend church or church functions which are not made a condition of employment. But since the comments in question were directed to complainant personally and unwelcome to her, they constituted the type of conduct which could form the basis for finding a violation of the FEHA.[62]

Pattern or Practice of Unlawful Behavior

The law forbids employers from engaging in a "pattern or practice" of discrimination, i.e., the offensive conduct at issue is the employer's "standard operative procedure." Stated differently, if the behavior is "its regular rather than the unusual practice" or the evidence reveals that the conduct is "repeated, routine or of a generalized nature," it will be deemed a pattern or practice. Isolated or sporadic events will be insufficient to establish the existence of a pattern or practice. A pattern or practice claim is generally asserted on behalf of multiple, as opposed to a single, complainants.

Example: The owner of a non-church-affiliated, for-profit home health agency described herself as a "practicing Christian, who adheres to a literal interpretation of the Bible," and openly shared her beliefs with her employees. She believed that "The Great Commission" required her to go into the world and share her faith, and that "the world" included the workplace. She did not believe that she could separate her work from her faith because the latter "permeates my thinking, my decisions." The owner held ceremonies during work hours in which she anointed new branch offices with olive oil and asked God's blessings upon the office. She also anointed offices where she felt there was stress and discord among employees, once doing so to rid an office of demons and to bring healing to another office. She defined the company's mission as being a "Christian dedicated provider of quality health care" and expected all employees to sign a written statement supporting that mission statement. Employees were required to participate in prayer and devotions during

[62] *DFEH v. Kathleen's Merle Norman Cosmetics Studio* (1998) FEHC Dec. No. 98-05. The FEHC found that the conduct in question was neither pervasive enough in terms of frequency nor severe enough in terms of content to constitute a hostile work environment and, therefore, ruled in favor of the respondents.

work hours, as well as watch religious-themed videos. Religiously-oriented documents were routinely distributed.

Written employment performance reviews were replete with Biblical references and admonishments to the employee in question to live within those principles. Employees were threatened with discipline, demotion or termination if their "spirituality" was found not to meet management's expectations, and required to allow their supervisors to "pray over" them and engage in the "laying on of hands" regarding their job performance.

Employees and job candidates who espoused different religious beliefs or practices than the owner and managers were subjected to commentary about their beliefs or practices, such as "You damned humanists are ruining the world" directed at a candidate who identified herself as a Unitarian. She was also told that she would burn in hell forever and denied employment. In the presence of an employee who identified herself as Catholic, a manager stated, "Oh, you know those Catholics, they're just heathens." Employees were also subjected to ridicule, such as when one Catholic employee was asked whether it was "really true that you keep the Holy Spirit in a box at the front of your church?"

In contrast, employees who conformed to the company's religious expectations were given preferential treatment in the form of promotions and freedom from discipline imposed upon other employees for the same infractions. Those who opposed the imposition of management's religious views upon them were assigned to the company's "Leader in the Making" program which was admittedly grounded in Biblical teachings and told that they had to be "broken," ostracized and intimidated.

Seven complainants claimed that they had been subjected to discrimination, harassment, retaliation and constructive discharge because of religion. In addition, a pattern and practice hostile environment claim was asserted. The court found sufficient evidence to allow the pattern and practice case to proceed to a jury trial, holding that a jury could find that management "routinely made their own religious values and preferences the guiding principals of daily work life, preached a particular brand of religion as workplace orthodoxy, proselytized employees to join in their religious preferences, and conditioned the work environment on a particular set of religious precepts." Likewise, as to the complainants' individual claims, there was sufficient evidence to support a jury's finding that the work environment was "pervaded with religious expressions and practices that were sufficiently frequent and demeaning as to be hostile, intimidating, humiliating or abusive."

The court rejected the employer's argument that employees were informed during interviews of the religious requirements of employment

(participation in prayers, devotions and video viewing) and, therefore, accepted the terms thereof voluntarily, finding sufficient evidence had been introduced to lead a jury to conclude that management's expressed "expectations" could amount to coercion, even though no written policies governing employee's religious participation were in place.[63]

2. By Employees

Employers have an obligation to prohibit employees from proselytizing or promoting their own religious beliefs in the workplace and/or while carrying out their duties when to do so would undermine the operation of the employer's business or subject other employees to unwanted harassment on the basis of religion.

Example: The work of an interpreter providing services for deaf or hearing impaired clients was guided by the terms of a national Registry of Interpreters for the Deaf Code of Ethics which were also incorporated into the collective bargaining agreement governing her employment with a state commission. In relevant part, the code of ethics provided that "[i]nterpreters/transliterators shall not counsel, advise or interject personal opinions . . . Just as interpreters/transliterators may not omit anything which is said, they also may not add anything to the situation . . . [T]he interpreter/transliterator's only function is to facilitate communication. He/she shall not become personally involved . . ." Two incidents caused the commission to issue a letter of reprimand to the interpreter:

a. She informed a client that "the Lord had delivered [her] from smoking," and asked the client if she could pray for him to quit smoking. She prayed aloud in the client's presence and he later complained.

b. She shared her personal history and religious beliefs with a client, whom she gave printed "tracts" discussing religious topics. That behavior also resulted in a complaint being lodged with the commission.

Following an investigation, the commission issued the letter of reprimand, informing the interpreter that if she did not refrain from promoting her religious beliefs while providing interpreting services, she could be subject to further disciplinary action, up to and including termination of her employment. The commission noted that it was "always willing to work with [her] on any scheduling issues that may need to be addressed to accommodate [her] religious activities."

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[63] *E.E.O.C. v. Preferred Management Corp.* (2002) 216 F.Supp.2d 763.

The interpreter claimed that she was singled out – because of her religious beliefs – for disciplinary action and denied a reasonable accommodation. The court ruled that the commission had reasonably accommodated the interpreter by not restricting her from "sharing her religious beliefs or religious tracts with others outside of the context of providing interpreting services to her clients, for example, with her co-workers or non-clients." But it would have constituted an undue hardship for the commission to allow her to promote her religious beliefs and provide tracts to clients, however, "in light of her position as a state employee, interacting with the public, some of whom are mentally ill, [because] there is a risk that these clients may confuse [her] statements concerning her religious beliefs and her distribution of religious tracts from the First Assembly of God Church as the Commission's endorsement of religion and/or the First Assembly of God Church."[64]

Example: The complainant described himself as a "devout Christian" with a duty to "expose evil when confronted with sin." His employer began displaying "diversity posters" depicting various employees with captions such as "Black," "Blonde," "Old," "Gay," and "Hispanic." The campaign slogan was "Diversity is Our Strength." In response, the complainant posted Biblical passages in his cubicle demonstrating his belief that "homosexual activities violate the commandments contained in the Bible. . ." The complainant admitted that his intention was to make the posted "scriptures [ ] hurtful so that people would repent (change their actions) and experience the joys of being saved." The court found, as did the employer, that the employee violated the company's anti-harassment policy "by attempting to generate a hostile and intolerant work environment . . ." The court described the scriptural quotes as "demeaning and degrading."[65]

Example: The complainant was a process engineer who described herself as an "evangelical Christian" who felt compelled to share her religious beliefs with her co-workers "in an effort to bring them to a saving faith in Jesus Christ." Without obtaining permission from her employer, she hosted a religious Christmas celebration in the conference room. She forwarded unsolicited invitations to her co-workers via e-mail using the employer's computer equipment and network, and asked her pastor to speak. She later held a Christian-based Easter party, again inviting her colleagues via e-mail. She displayed religious written materials bearing the word "Jesus" with the stated goal of "convert[ing] people to evangelical Christianity." Once again, she did not obtain her employer's permission prior to hosting the Easter event.

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[64] *Quental v. Connecticut Com'n on Deaf and Hearing Impaired* (2000) 122 F.Supp.2d 133, affirmed by *Knight v. Connecticut Dept. of Public Health* (2nd Cir. 2001) 275 F.3d 156.
[65] *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599.

After the complainant was counseled by management regarding the employer's policies prohibiting the use of the physical premises or e-mail system for non-work-related purposes, as well as barring the distribution of controversial materials in the office, the complainant asked the human resources manager for permission to use the conference room for a prayer event on the National Day of Prayer. When her request was denied, she appealed the decision to the company's chief executive officer, but promised to abide by his ratification of the denial and reminder of the employer's commitment to a "neutral work environment."

Nonetheless, the complainant began an "e-mail ministry" in which she quoted Scripture and held unauthorized weekly prayer meetings in the employer's conference rooms. She was again counseled and warned in writing that further violations of the employer's policies would result in discipline up to and including termination of her employment. Undeterred, the complainant continued using the employer's e-mail system to send announcements about prayer meetings to be held away from the workplace in which she quoted Scripture and asked her co-workers to pray for her e-mail ministry and become a partner in her prayer ministry.

The employer terminated her employment on the ground of insubordination, prompting the complainant to allege that she was subjected to discrimination because of her religious practices and denied a reasonable accommodation thereof.

The court found that the complainant's workplace conduct conflicted with the employer's anti-harassment policy which was "consistent with public policy embodied in the FEHA." The complainant's conduct impacted other employees whom she targeted in the hope of converting them to her religious beliefs, causing them to complain to the employer about her behavior. The court reasoned that if it required the employer to accommodate the complainant's professed need to proselytize in the workplace, the employer would be forced to violate its own workplace policy and be subjected to claims by other employees "desiring to use company facilities to share their own religious beliefs." Accommodating the complainant's religious practices (proselytizing in the workplace) would cause it to suffer an undue hardship.

I. Affirmative Defense

The employer's failure to provide the employee with a reasonable accommodation of his/her religious belief or observance may be legally excused if the employer can demonstrate:

- That it made good faith efforts to accommodate the complainant's beliefs; and

- That any further accommodation would impose an undue hardship upon the respondent.

1. "Good Faith"

"Good faith efforts"[66] mean that the respondent must take all available steps, short of those that would impose an undue hardship upon the respondent, to release the complainant from the demands of the respondent's work rule which conflicts with the complainant's religious needs. As noted above, when there is more than one method of accommodation available, the respondent must use the one that least disadvantages the complainant with respect to his or her employment opportunities, such as compensation.

That does *not* mean that the respondent must provide the accommodation *most preferred* by the complainant, but does require that the employer make all reasonable efforts to eliminate the work-rule conflict without negatively impacting the individual's employment status.[67]

> *Example: A home improvement store sales associate, discussed above, adopted a belief that he must cease working on the Sabbath and declined to do so. He was told by the new store manager that he "needed to be fully flexible and if he could not work on Sundays then he could not work there." The complainant also declined the employer's offer of part-time employment on the ground that he would lose not only his guaranteed 40-hour work week (and associated compensation), but associated employment benefits such as insurance. His employment was terminated.*
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> *The employer argued that granting the employee every Sunday off would require other employees to assume a larger workload of undesirable shifts*

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[66] *DFEH v. Union School District* (1980) FEHC Dec. No. 80-32, p. 8, and *DFEH v. District Lodge 120, International Association of Machinists and Aerospace Workers* (1981) FEHC Dec. No. 81-07.

[67] "Employment status" is generally understood to refer to an employee's compensation, terms, conditions, or privileges of employment. Although the FEHC has not explicitly defined "employment status" within the context of religion, its Regulations pertaining to the California Family Rights Act (CFRA) refer to "employment status" when discussing an employee's return to his/her same or a comparable job. In that context, "employment in a comparable position" means employment in a position which is *virtually identical* to the employee's original position in terms of pay, benefits, and working conditions, including the same privileges, perquisites and status. The comparable position must have the same or substantially similar duties and responsibilities, require substantially similar skill and effort, provide substantially similar responsibility and authority, be performed at the same or geographically proximate worksite, have the same shift or the same or an equivalent work schedule. (Cal. Code Regs, tit. 2, § 7297.0, subd. (g).) The FEHC has followed California and federal courts in ruling that public school teachers who require time off for religious observances may be accommodated by being granted the time off with partial pay or no pay (*DFEH v. Union School District* (1980) FEHC Dec. No. 80-32, p. 8-9).

and, in turn, lower morale and productivity, as well as increase the possibility that the employer would have to pay overtime.

Whether or not the employer violated the FEHA is a fact-specific inquiry which the appellate court directed the trial court to answer while noting that an accommodation might be deemed unreasonable "if it causes an employee to suffer an inexplicable diminution in this employee's status or benefits . . . In other words, an accommodation might be unreasonable if it imposes a significant work-related burden on the employee without justification, such as the neutral operation of a seniority system."[68]

Example: The complainant was employed as a boiler operator in an olive processing plant for four years, working Sunday through Thursday. He was a member of the Worldwide Church of God and required to observe the Sabbath by abstaining from work from sunset Friday to sunset Saturday. When the plant changed its operating schedule, it eliminated Sunday shifts and assigned the complainant to work Monday through Friday from 10:00 p.m. to 6:00 a.m. However, it did not require him to actually work the Friday shift since two other employees voluntarily covered his Friday shift on a rotating basis. Because the controlling collective bargaining agreement prohibited those employees from receiving overtime pay, the complainant only worked four shifts per week. After covering his Friday shifts for him for more than two years, the other employees declined to continue doing so. At that point, the employer refused to pay overtime to have other employees cover the complainant's Friday shifts for him, but sought to achieve a reasonable accommodation of the complainant's religious practice, including asking for other volunteers to work his Friday shifts, discussing the matter with union representatives, attempting to hire a boilermaker who would work just one shift per week, and determining if there were any open positions for which he was qualified into which the complainant could be transferred. As a result, the employer determined it would transfer the complainant to a general laborer position with a Monday through Friday 7:00 a.m. to 3:00 p.m. work schedule which paid $.80 per hour less. However, complainant's gross income would increase because he would work five shifts per week, not four. Upon learning that he had been transferred, the complainant took a personal leave of absence from which he failed to return to his duties or contact his employer for five consecutive days.

The complainant claimed that he was subjected to discrimination because of his religious beliefs and denied a reasonable accommodation. The court rejected his arguments, finding that the employer's attempts to accommodate the complainant's religious observance were reasonable, given that an employer is not required to pay "premium wages" in order to

[68] *Baker v. The Home Depot* (2nd Cir. 2006) 445 F.3d 541, 548, citing *Cosme v. Henderson* (2nd Cir. 2002) 287 F.3d 152, 158.

provide accommodation and allowing lateral transfers or changes of jobs meets an employer's obligation. Even though the complainant was moved to a lower-paying position, it resulted in his enjoying higher total wages and may only have been temporary until a position in his original job classification became available. In any event, a transfer which adversely impacts an employee is an acceptable "last resort" when no accommodation can be provided to the employee in his/her current job classification/position.[69]

Example: Complainant had been employed by respondent as a machine tool operator for 18 years. For more than 25 years, he had also been a practicing member of the Jehovah's Witness faith. One of the tenets of complainant's faith was that he could not perform work on any part or product that could be used as an implement of war. Thus, throughout his employment, he was excused from working on any order for parts or equipment placed by the Armed Services and reassigned to other projects. Despite that precedent, respondent asked complainant to work on a project for the U.S. Navy. He refused.

Respondent claimed that it offered complainant a job in the shipping department which was the only position which was both vacant and would accommodate complainant's religious beliefs. Respondent argued that reassigning complainant would have constituted an undue hardship. Complainant was placed on suspension. He asserted that respondent never offered him the position in the shipping department and, even if it had, it was not a reasonable accommodation. Moreover, he had been reassigned on numerous occasions in the past to different projects while maintaining his job classification when the company received orders from the Armed Services. Complainant argued that no undue hardship was imposed on the employer and, in fact, his transfer helped facilitate work-flow.

Did the employer violate the FEHA? The question is fact-specific and the answer will depend upon whether or not the respondent can show that it would have suffered an undue hardship if it transferred the complainant, in addition to whether or not it can establish that the position in the shipping department was the only vacant position to which it could transfer complainant in order to accommodate his religious beliefs.[70]

Example: A police officer was assigned to a district within which two clinics that performed abortions were situated. After demonstrations were staged at the clinics, the police department decided to assign one or more officers at each of the various clinics throughout the city in order to protect the clinics' property and assure the safety of clinic employees. The

[69] *Cook v. Lindsay Olive Growers* (9th Cir. 1990) 911 F.2d 233.
[70] *EEOC v. Dresser-Rand Company* (2006) Slip Copy, 2006 WL 1994792 (W.D.N.Y.).

purpose of the assignments was "to keep the peace between demonstrators." The officer was assigned to one of the clinics on two occasions and completed the assignment both times. However, after the second assignment, "he became convinced that his presence at the clinic facilitated the ongoing activities of the abortion clinic and, consequently, conflicted with his Roman Catholic beliefs." He advised the watch commander that he would report to the clinics on an emergency basis, but otherwise desired not to be assigned there. The watch commander responded that he could not grant the officer a formal "exemption" but would try not to assign him to the clinics. Some months later, he sent a memorandum to his employer, reiterating the basis of his religious objection and requesting that he "be exempted from future assignments at abortion clinics because of these religious beliefs." The police department never responded to the officer's memo and eventually he was briefly assigned to one of the clinics.

The officer contended that he had been denied a reasonable accommodation, but the court disagreed on the ground that there were several alternative accommodations available to the officer which he declined to take advantage of. For instance, he had enough seniority to bid on a transfer to one of six (6) other districts in which there were no abortion clinics. He also could have applied for a "special function assignment," changed his shift, changed his start time, or used accrued time off in order to avoid being assigned a clinic. The court found that the officer gambled on the informal arrangement he made with the watch commander so that he could remain assigned to that district. He consciously elected not to choose one of several available accommodations which did not carry the same risk that he might be assigned to a clinic. Ruling in the police department's favor, the court emphasized that "the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation."[71]

a. Knowledge of Employee's Need for Accommodation Imposes Good Faith Obligation Upon Employer

An employer cannot be found to have violated its duty of good faith if it is not made aware of the employee's need for accommodation.

> *Example: In the case of the executive housekeeper of a new hotel whose employment was terminated when he was insubordinate, the complainant never expressed a request for reasonable accommodation to his employer. Rather, he simply stormed out of the meeting with the Gideons. The courts emphasize that an employee must give his/her employer "fair warning of the employment practices that will interfere with his religion and that he*

[71] *Rodriguez v. City of Chicago* (1997) 975 F. Supp. 1055.

therefore wants waived or adjusted." An employee's religious beliefs and practices are not readily visible and obvious, even in the event that the employee wears some sort of symbol or adornment. And an employee who seeks accommodation may still be expected to abide by reasonable workplace behavioral standards. "There is a line, indistinct but important, between an employee who seeks an accommodation to his religious faith and an employee who asserts as [the complainant] did an unqualified right to disobey orders that he deems inconsistent with his faith though he refuses to indicate at what points that faith intersects the requirements of his job. . . [The complainant] failed to give any indication of what future occurrences at the [hotel] would impel him to make a scene embarrassing to the manager and potentially injurious to the employer." Therefore, no obligation to provide a reasonable accommodation attached to the employer.[72]

b. Obligation to Proceed in Good Faith is Mutual

The obligation to proceed in good faith to ascertain whether a reasonable accommodation can be achieved is a *mutual obligation*. The employee requesting accommodation must cooperate with the employer in its effort to grant his/her request. As one court put it, an "employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer."[73]

For instance, an employee cannot simply refuse to meet with the employer's representatives who are charged with responsibility for granting or denying the employee's request and later charge that the employer did not live up to its obligation.

<u>Example</u>: A staff nurse assigned to the Labor and Delivery section of a university-operated hospital advised her employer that her religious beliefs prohibited her from participating "directly or indirectly in ending a life," including abortions of live fetuses. The nurse was a member of the Pentecostal faith. The nurse informed the hospital in writing of her religious beliefs on at least two occasions. The hospital allowed the nurse to trade assignments with other nurses on those occasions when emergency procedures considered by the nurse to constitute abortions were performed on patients, however, the nurse refused to participate in providing emergency treatment on two occasions described by the hospital as life-threatening. In the second instance, the hospital claimed that the nurse's refusal resulted in a 30-minute delay of treatment to the patient until such time as another nurse could be located. As a result, the hospital

[72] *Reed v. Great Lakes Companies, Inc.* (7th Cir. 2003) 330 F.3d 931.
[73] *Brener v. Diagnostic Center Hospital* (5th Cir. 1982) 671 F.2d 141, 144 n. 2.

notified the nurse that she could no longer work in the Labor and Delivery section, offering her a lateral transfer to the Newborn Intensive Care Unit.

The hospital invited the nurse to meet with its Human Resources Department personnel who would "help her identify other available nursing positions." The nurse assumed that in the Newborn ICU she "would again be asked to undertake religiously untenable nursing actions (or inactions)" such as allowing "extremely compromised" infants to die. She never discussed her assumption with hospital officials. Moreover, she declined to meet with the hospital's Human Resources representatives to investigate other possible areas in the hospital to which she might transfer, believing that there were no other positions available.

The court ruled in favor of the hospital, finding that its offer of a lateral transfer to the Newborn ICU with no reduction in pay, benefits or status, in addition to its invitation to engage in an interactive process with the nurse for the purpose of ascertaining a reasonable accommodation, satisfied its burden. "In sum, [the nurse's] refusal to cooperate in attempting to find an acceptable religious accommodation was unjustified. Her unwillingness to pursue an acceptable alternative nursing position undermines the cooperative approach to religious accommodation issues that [lawmakers] intended to foster."[74]

<u>Example</u>: A used car salesperson was required to work during a weekend "tent sale." However, that event conflicted with the conversion ceremony in which his wife was participating following her completion of study to convert from Catholicism to Judaism. When his rabbi notified the complainant of the date and time selected for the ceremony, he was aware that his employer expected him to work all weekend, but did not ask the rabbi to reschedule the event. Rather, he arranged with his supervisor to be absent from a two-hour sales meeting in order to attend the ceremony, but when the manager learned of the arrangement, the manager rescinded it. He ordered the complainant to attend the meeting or have his employment terminated. The complainant stated his intent to attend the conversion ceremony and was fired. The manager then attempted to "talk things over" with the complainant, who collected his final paycheck and refused to discuss the matter further. He claimed that he was subjected to discrimination and denied a reasonable accommodation of his religious practices.

[74] *Shelton v. University of Medicine & Dentistry of New Jersey* (3rd Cir. 2000) 223 F.3d 220.

In order to establish the existence of a prima facie case, it is not necessary to show that the complainant made an effort to compromise his/he religious beliefs or practices prior to seeking a reasonable accommodation. Therefore, the court rejected the employer's contention that the complainant should have rescheduled the conversion ceremony, finding that he believed the date for the ceremony was fixed since his wife was not the only convert involved and the conversion process needed to be completed before his son's bar mitzvah which was coming up in less than one month (since Jewish law dictates that children take their mother's religion, the complainant's son could not be bar mitzvahed until his wife converted). Additionally, he relied in good faith upon his supervisor's grant of sufficient time off to attend the ceremony.

The obligation to provide a reasonable accommodation inures when the employer has sufficient information to "understand the existence of a conflict between the employee's religious practices and the employer's job requirements." Imposing a greater notice requirement would allow employers to probe impermissibly for details about the employee's religious practices to decide whether compliance is required, thereby destroying the intent of the statutes granting protection. The undisputed facts showed that both the supervisor and manager knew that the complainant was Jewish and his wife was studying to convert. Additionally, the complainant informed his supervisor of the reason he needed time off. The employer gave no good faith reason for rescinding permission to miss the meeting and made no attempt to arrive at a suitable accommodation.

The employer's argument that its effort to "talk things over" constituted an attempt to provide a reasonable accommodation was rejected by the court as "too little, too late" because it came after the complainant's employment had been terminated, i.e., after the employer violated the law. Although the obligation to engage in good faith efforts to achieve an accommodation is mutual, the employee's duty to cooperate "arises <u>only</u> after the employer has suggested a possible accommodation: "[T]he statutory burden to accommodation rests with the employer[;] the employee has a correlative duty to make a good faith attempt to satisfy his needs <u>through means offered by the employer</u>." [Emphasis in original.] Since the employer made no effort to accommodation the complainant prior to terminating his employment, the obligation to cooperate with the employer in that process never arose. Because the employer took no "initial step" toward resolving the conflict between his work

schedule and religious practice, the complainant had no duty to suggest alternatives or compromises.[75]

c. Employee Must Accept a Reasonable Accommodation

As noted above, an employee cannot demand that a particular accommodation be provided him/her, but, rather, must accept a *reasonable* accommodation offered by the employer.

> *Example: A computer manufacturer initiated a workplace diversity campaign. As part of its program to heighten employee awareness, the company posted a series of five posters depicting an employee above the captions "Black," "Blonde," "Old," "Gay," and "Hispanic." The second series of posters featured the same five employees with a description of the individual's personal interests and bearing the slogan "Diversity is Our Strength."*
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> *In response, the complainant, who described himself as a "devout Christian" posted two Biblical passages (2 Corinthians 10:12 and Isaiah 3:9) on an overhead bin in his assigned work cubicle. The complainant believed that homosexuality violates the commandments and he was required "to expose evil when confronted with sin." The Biblical quotes were printed in large typeface and clearly visible to anyone passing by his cubicle. Shortly thereafter, he posted what the court described as "the well-known and highly controversial passage from Leviticus: 'If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be put upon them.'"*
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> *The company removed the passages on the ground that they violated the company's harassment policy, which stated, in pertinent part: "Any comments or conduct relating to a person's . . . sexual orientation, . . . that fail to respect the dignity and feeling [sic] of the individual are unacceptable."*
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> *The company held a series of four meetings with the complainant, during which he was given ample opportunity to explain his beliefs. He stated that the quotes he posted were "intended to be hurtful.*

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[75] *Heller v. EBB Auto Co.* (9th Cir. 1993) 8 F.3d 1433. The court also rejected the employer's argument that the complainant's attendance at his wife's conversion ceremony did not amount to a religious practice protected by the statute. The law protects all aspects of religious observance and practice, not just those that are required or proscribed. The complainant testified that "the ceremony, and the role of the father and husband in it, are part of the basic teachings of Judaism. By sacrificing his job to attend, [the complainant] demonstrated that he attached the utmost religious significance to the ceremony."

And the reason [they were] intended to be hurtful is you cannot have corrections unless people are faced with truth." He hoped that "his gay and lesbian co-workers would read the passages, repent, and be saved."

When he re-posted the scripture quotes and refused to remove them, his employment was terminated for insubordination. The complainant sued his former employer, claiming that he had been subjected to disparate treatment and denied a reasonable accommodation. Rejecting his claim, the court emphasized that the employer met with the employee at least four separate times. The company explained the reasons for the diversity campaign, allowed the employee to voice his beliefs and reasons for posting the quotes, and sought to "resolve the conflict in a manner that would respect the dignity of [the employee's] fellow employees." The complainant, however, demanded that either the company's "Gay" posters be removed, along with his anti-gay Biblical quotes, or that both the posters and his scripture citations be allowed to remain. The employee never proposed any other form of accommodation for the employer's consideration and the complainant's demands were deemed by the court to be unreasonable.[76]

2. Undue Hardship

Even if an employer shows that it made a good faith *effort* to grant the complainant's request for accommodation, if it ultimately denied the request and refused to provide the accommodation, it bears the burden to demonstrate that all available means of accommodation considered were rejected because implementation would impose an undue hardship upon the employer.

In other words, an accommodation is "reasonable" unless it imposes an "undue hardship" upon the employer.[77] What constitutes an undue hardship is a fact-specific inquiry. The factors to be considered when making that determination include, but are not limited to:

- The size of the relevant establishment or facility with respect to the number of employees, the size of the budget and such other matters;

- The overall size of the employer or other covered entity with respect to the number of employees, number and type of facilities and size of budget;

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[76] *Peterson v. Hewlett-Packard Co*. (9th Cir. 2004) 358 F.3d 599.

[77] Note that in the context of complaints alleging discrimination because of religion, the "undue hardship" analysis is not the same as the standard for establishing "undue hardship" upon the employer as a defense to the obligation to provide a reasonable accommodation for a job applicant or employee with a disability. For a complete discussion, refer to the Chapter entitled "Physical or Mental Disability or Medical Condition."

- The type of the establishment's or facility's operation, including the composition and structure of the workforce or membership;

- he type of the employer's or other covered entity's operation, including the composition and structure of the workforce or membership;

- The nature and cost of the accommodation involved;

- Reasonable notice to the employer or other covered entity of need for accommodation; and

- Any available reasonable alternative means of accommodation.[78]

It is considered an undue hardship if the employer is expected to bear more than a *de minimis* cost in order to provide an accommodation.[79] "*De minimis*" is defined as lacking significance or importance; so minor as to be disregarded.[80] Therefore, in order to provide a reasonable accommodation of an employee's religious belief or observance, the employer is required to bear only inconsequential or negligible cost(s).

> *Example: In the case discussed above involving the temporary carpenter who claimed he had been denied a reasonable accommodation because he was not allowed to work overtime on the days he requested, the court found that the accommodation requested by the complainant would serve to impose an undue hardship on the district. The uncontroverted evidence showed that if the complainant worked on Sunday, the district was required to pay him double time. Even though he offered to be paid only time-and-a-half, the district would still be required to pay at least one other employee to work with him, thereby resulting in more than a de minimis cost to the employer and defeating the complainant's claim.*[81]

> *Example: In the case of the Muslim psychologist employed by a correctional facility who was required to attend worship services each Friday afternoon, discussed above, the respondent's asserted defense of undue hardship was not persuasive. The evidence showed that the number of staff psychologists had increased from 8 to 12 during complainant's tenure and, thus, there were sufficient employees to handle the "psych line" without complainant's participation. Additionally, the*

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[78] Cal. Code Regs, tit. 2, § 7293.3, subd. (b)(1)-(7).
[79] *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 84.
[80] Merriam-Webster, Inc., 1996, *Merriam-Webster's Dictionary of Law.*
[81] *Creusere v. Board of Education of the City School District of the City of Cincinnati* (2003) 88 Fe.Appx. 813.

supervisor noted just before taking adverse action against complainant that "everything is going rather well."[82]

Example: The complainant was a practicing Jehovah's Witness employed as a secretary/payroll clerk who provided backup support to other employees by answering the telephone. When she was instructed by the president of the company where she was employed to answer the telephone with the greeting, "Merry Christmas," she explained that to do so would compromise her beliefs as a Jehovah's Witness. In response, the president informed that if she would not answer the telephone with the holiday greeting, he would "write her a check." The complainant sought assistance from both her immediate supervisor and the vice-president of the company, both of whom told her she must comply with the president's directive. Because she refused, her employment was terminated.

The complainant was subjected to discrimination and denied a reasonable accommodation because of her religion. Jehovah's Witnesses is an "established and recognized religion." In support of her assertion that saying "Merry Christmas" to "another person, at any time or in any manner, would be considered by her as a violation of her religious beliefs," the complainant offered the confirmation of an elder and members of the governing body of her congregation, as well as the group's official publications explaining the prohibition on the observance of Christmas.

The employer discriminated against the complainant. Although she sought an accommodation of her beliefs, the company made no good faith effort to fashion an accommodation that would not result in undue hardship. Moreover, such accommodation could easily have been granted by either excusing the complainant from providing backup telephone support during the Christmas season or allowing her to answer incoming calls with a standard business greeting such as "Good morning, how may I direct your call?" Neither accommodation would have resulted in an undue hardship to the employer.[83]

a. Impact on Co-Workers

The imposition of an actual, non-trivial burden upon the requesting employee's co-workers may constitute an undue hardship which excuses the employer from granting the accommodation. Examples include, but are not limited to requiring co-workers to work undesirable shifts or give up other benefits of employment, or be exposed to unsafe working conditions.

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[82] *DFEH v. California Department of Corrections* (1997) FEHC Dec. No. 97-10.

[83] *Kentucky Com'n on Human Rights v. Lesco Mfg. & Design Co., Inc.* (1987) 736 S.W.2d 361.

The burden placed on co-workers must be *more than* de minimis. Grumbling, general dissatisfaction, lowered morale, and hypothetical or speculative employee complaints are insufficient to meet the required showing. Acute employee discontent must be demonstrated. This is usually accomplished by a showing of several unsuccessful attempts to implement different forms of accommodation.

> *Example: The complainant, a postal service clerk, refused to distribute draft registration materials because she adhered to the Peace Testimony of the Society of Friends (Quakers) which opposes war and militarism. The court found that the complainant could simply refer registrants to another service window without creating a disturbance. The complainant not only had the full support of her union, but her co-workers, who would bear the burden of the extra assignment, were also supportive. The employer must present more than speculation about other employees making similar requests. To demonstrate undue hardship, a concrete showing of actual impositions upon other employees or disruption of their work routines is required.*[84]

b. Impact on Employer's Business Operation (Non-Financial)

An employer may also demonstrate that an accommodation would impose a non-financial hardship upon its business operation such as interference with legitimate policies or programs.

> *Example: The complainant who posted Biblical quotes condemning homosexuality in his cubicle insisted that either the company's "Gay" posters be removed, along with his anti-gay Biblical quotes, or that both the posters and his scripture citations be allowed to remain. The court found that the complainant had not submitted any evidence to support his disparate treatment claim. Although he argued that the company's diversity campaign was "a crusade to convert fundamentalist Christians to its values," including the promotion of "the homosexual lifestyle," the court held that the company's "efforts to eradicate discrimination against homosexuals in its workplace were entirely consistent with the goals and objectives of our civil rights statutes generally." The complainant's proposed accommodation would have required the company to eliminate sexual orientation from its diversity program, thereby infringing upon the company's right to "encourage tolerance and good will among its workforce," while under the second scenario, the company would have been required to "permit an employee to post messages intended to demean and harass his co-workers."*

[84] *McGinnis v. U.S. Postal Service* (1980) 512 F.Supp. 517.

An employer is not required to accommodate an employee's religious beliefs if the accommodation results in discrimination against the employee's co-workers or deprives them of a contractual or statutory right, nor must an employer accommodate an individual employee's efforts to impose his/her religious beliefs upon other employees. The employer successfully argued that either of the forms of accommodation demanded by the complainant would have "inhibited its efforts to attract and retain a qualified, diverse workforce, which the company reasonably views as vital to its commercial success."[85]

c. Health and Safety Considerations

An employer is not required to grant an employee's request for a reasonable accommodation if it can demonstrate that to do so would endanger the health and safety of either the requesting employee or his/her co-workers. The evidence must demonstrate that the impact upon the requesting employee or his/her co-workers would be more than *de minimis* to provide legal justification for the employer's denial of the request.

Example: An oil refinery adopted a safety policy requiring all employees whose duties might cause them to be exposed to toxic gases to shave any facial hair that would prevent them from obtaining a gas-tight face seal while wearing a respirator. The policy was required by the Occupational Safety and Health Administration (OSHA) and applied uniformly to all affected employees, including machinists. The complainant had been employed as a machinist for several years when the policy was adopted. He informed his employer that because he was a devout Sikh he could not comply since his religious beliefs prohibited him from cutting or shaving any of his body hair, including his beard.

The employer offered him several positions that did not require the use of a respirator, all at lower pay rates, but promised him that he would be reinstated to his job as a machinist if respiratory equipment that could be safely used with a beard were developed at some point in the future.

Although the complainant established a prima facie case of religious discrimination, the employer proved that allowing the complainant to remain in the position of machinist would have caused it to suffer an undue hardship. If the complainant were to continue working as a machinist but perform only duties that did not expose him to toxic gas, the employer would have been required to completely revamp its

[85] *Peterson v. Hewlett-Packard Co*. (9th Cir. 2004) 358 F.3d 599.

system of duty assignments and require his co-workers to assume his share of potentially hazardous tasks, rather than allocating the share of hazardous work equally among all employees in the same job classification.[86]

d. Otherwise Required by Law

An employer is not required to violate applicable laws governing its business or operations in order to grant an employee's request for reasonable accommodation of his/her religious beliefs.

Example: In the case of the interpreter providing services for deaf or hearing impaired clients, discussed above, the court's holding in favor of the employer was based in part upon the fact that the national Registry of Interpreters for the Deaf Code of Ethics, incorporated into the collective bargaining agreement governing the employment relationship, prohibited interpreters from "interject[ing] personal opinions" or becoming "personally involved" while providing services to clients. The court found that the employer could not allow the interpreter's behavior to continue unabated because to do so would violate the terms of the code of ethics.[87]

Example: In the case of the Sikh machinist who could not comply with his employer's requirement that he obtain a gas-tight face seal while wearing a respirator because of the beard he was required to maintain in accordance with his religious beliefs, the court held in favor of the employer. By allowing the complainant to work as a machinist and be exposed to toxic gas, the company would have subjected itself to liability for violating OSHA's workplace standards. The imposition of such risk of liability would constitute an undue hardship.[88]

Example: The complainant was offered a position as a Senior Network Analyst. Before he began work, the employer required that he complete a number of forms providing relevant information to the employer, including his Social Security number. The complainant argued that his sincerely held religious belief prevented him from providing a Social Security number because such number is the "Mark of the Beast" prophesied in Revelations (the last book of the Bible). When the complainant refused to provide a Social Security number, the employer withdrew its offer of employment.

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86 *Bhatia v. Chevron U.S.A., Inc.* (9th Cir. 1984) 734 F.2d 1382.
87 *Quental v. Connecticut Com'n on Deaf and Hearing Impaired* (2000) 122 F.Supp.2d 133.
88 *Bhatia v. Chevron U.S.A., Inc.* (9th Cir. 2006) 734 F.2d 1382.

The court ruled that the complainant had a sincerely held religious belief about which he informed his employer. It was also undisputed that the complainant's refusal to provide a Social Security number was the reason the employer took adverse action against him, i.e., refused to hire him.

Nonetheless, the court held that the complainant failed to make a prima facie showing because the employer was required by several laws to obtain Social Security numbers from all of its employees. If the employer failed to do so, it would violate, among other things, laws enforced by the Immigration and Naturalization Service and Internal Revenue Service. Such result establishes the existence of an undue hardship and excuses the employer from the obligation to provide a reasonable accommodation of the employee's religious belief or observance.[89]

Public sector employees, as well as, for example, witnesses in legal proceedings, attorneys, judges, justices, and peace officers are required to take an oath of allegiance to the United States, the Constitution and/or the specific entity by which they are employed or will provide testimony or services, e.g., the State of California. However, some religious beliefs prohibit swearing an oath of allegiance or saluting the flag. In such instances, the employee is entitled to a reasonable accommodation of his/her religious belief. For instance, rather than taking an oath, employees and job applicants may instead affirm their obligation to uphold and abide by the Constitution and controlling laws.

Example: The complainant, a Jehovah's Witness, was hired as a state trooper cadet and commenced basic training. The employee manual, entitled "Procedures, Rules and Regulations," stated that all cadets were to "assemble for flag formations [twice daily] unless otherwise assigned." It also provided that any cadet who deviated from the rules would be subject to discipline up to and including termination. Therefore, the complainants participated for the first two days of training. However, the tenets of his religion state that the flag of any state or union shall not be saluted. Additionally, Jehovah's Witnesses "may only swear allegiance to [their] faith and to God." Even so, on his employment application, the complainant had indicated his willingness to take an oath to support the United States and state Constitutions.

After consideration of those provisions, the complainant determined that he had to resign his position because of the conflict between his

[89] *Sutton v. Providence St. Joseph Medical Center* (9th Cir. 1999) 192 F.3d 826. (See also *Bhatia v. Chevron U.S.A., Inc.* (9th Cir. 2006) 734 F.2d 1382, 1383-84; *Baltgalvis v. Newport News Shipbuilding Inc.* (2001) 132 F.Supp.2d 414.)

religious beliefs and practices, and the requirements of his new employment. He advised his supervisor and suggested that instead of saluting the flag he be permitted to stand respectfully or perform cleaning duties in another location. When his supervisor advised him that no accommodation was available, the complainant believed that he had no choice but to resign because "he would be fired for insubordination and humiliated if he did not comply with his employment requirements." A subsequent meeting with the training academy commander yielded the same result. In fact, the commander presented him a prepared resignation letter stating that his resignation was for "personal reasons." On his exit questionnaire, the employee wrote: "As one of Jehovah's Witnesses, it goes against my beliefs to salute any flag, or pledge allegiance to any country or state. This makes it impossible for me to give the oath to be a Trooper. My time away is also hard on my family." The complainant was even subjected to an exit interview which was devoid of any discussion about reasonable accommodation of his belief. After his resignation had been accepted by the employer, the complainant spoke with a human resources representative who reiterated that "he would have to salute the flag and swear his allegiance by taking the Oath." The chief never returned the complainant's telephone call.

It was beyond dispute that the complainant had a sincerely held religious belief that conflicted with his employment requirements and he informed his employer of the conflict. However, the court found that the complainant was neither threatened with termination of his employment nor constructively terminated because no reasonable jury could find that a reasonable person would have found the conditions of his employment intolerable. The court opined that a reasonable person would not have felt compelled to resign "at that stage of the matter. The mere fact that the Manual declares that rule violations may result in discipline or termination is not enough. . . We see no reason why, as part of the screening and training process, the [training] Academy staff must try to talk every recruit out of resigning once an individual announces that he wants to leave."

The dissenting opinion is better-reasoned. Noting that the case was "about the fundamental right to religious freedom," the opinion points out that the Manual, "uncontradicted by [the complainant's] supervisors, provided [him] a compelling threat of either discipline or discharge." The complainant understood that by failing to salute the flag and take the oath, his employment would be terminated for insubordination, thereby jeopardizing any future employment in law enforcement. He also feared a "humiliating public spectacle in front of his peers and superiors" when he refused the order to salute.

Therefore, a reasonable person, after speaking with several of his/her superiors, all of whom denied the reasonable accommodation sought, would have believed that resignation was the only option available whereby he/she could preserve his/her future employment opportunities and dignity. An employee in need of a reasonable accommodation should not have to risk being fired and humiliated "in order to put to the test" the employer's policies and rules. The obligation to provide a reasonable accommodation falls upon the employer and the employer in this case made no effort whatsoever to fulfill its legal obligation to the complainant.

Also critical to the dissent's reasoning was the fact that, had it granted the complainant's request, the employer would not have suffered a hardship of any sort.[90]

J. Special Considerations

1. Collective Bargaining Agreements

An employer is not required to violate an employee's rights under a collective bargaining agreement in order to provide a reasonable accommodation of another employee's religious belief or observance. Stated differently, an employer is not required to take steps inconsistent with a neutral application of a seniority system in order to accommodate an employee's religious beliefs.

Example: An airline employee became a member of the Worldwide Church of God, one of the tenets of which was that believers must observe the Sabbath by refraining from performing any work from sunset on Friday until sunset on Saturday. Additionally, the religion proscribes work on specified holidays throughout the year. The employee was assigned to a department that was required to operate 24 hours per day, 365 days per year. He sought relief from the requirement to work during the Sabbath period. Shifts were assigned in accordance with the applicable collective bargaining agreement. Unfortunately for the employee, he did not have sufficient seniority to successfully bid for a position that did not require him to work on his Sabbath.

In order to accommodate the employee, the airline would have been required to violate the terms of the collective bargaining agreement and, in so doing, infringe upon the contractual rights of other employees who might have "strong, but perhaps nonreligious, reasons for not working on weekends." The court noted that the airline would have "deprive[d] another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath." Such result is not permissible under civil rights statutes. Employers are not required

[90] *Lawson v. Washington* (9th Cir. 2002) 296 F.3d 799.

to carve out special exceptions to bona fide seniority systems in order to provide accommodation.[91]

Example: The temporary carpenter who asked to work overtime on Sundays in light of the fact that other employees worked overtime on Saturday when he was observing the Sabbath reasoned that he was being denied the opportunity to work as much overtime as the other employees because of his religious beliefs. The complainant offered to be paid only time-and-a-half, but the collective bargaining agreement required that double time be paid for overtime worked on Sunday.

The court found that, even assuming that employees were guaranteed overtime (they were not), the employer could not be called upon to violate the collective bargaining agreement in order to accommodate the complainant.[92]

However, an employer may not assert the mere existence of a collective bargaining agreement to escape its obligation to make a good faith effort to ascertain whether a reasonable accommodation of an employee's religious belief can be implemented.

Example: An airline employee was a Conservative Jew. She kept a kosher home and strictly observed the three major Jewish holidays, Yom Kippur, Rosh Hashanah, and Passover, treating those holidays as days of observance (she refrained from driving, answering the telephone, watching television, etc.). The terms and conditions of the employee's employment with the airline were governed by a collective bargaining agreement. The employee bid for vacation time encompassing the religious holidays, but did not have sufficient seniority to get all of the days off that she requested. She then submitted a request for "day-at-a-time" vacation leave covering the first day of Passover, but it was denied, so she posted a request on the employee bulletin board looking to trade days off with another employee. She also asked more than 15 employees to accommodate her. Unfortunately, her efforts were unavailing, in part because the day she sought to be off was also Easter Sunday. When she discussed the situation with her supervisor, she was told, "You're not here, you're fired." Her attempts to explain the religious significance of the day were rebuffed. Her supervisor asked her, "Well, what makes you think it's more important for you to have your holiday off than someone celebrating Easter?" The airline made no attempt to assist the employee in securing the day off.

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[91] *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63.

[92] *Creusere v. Board of Education of the City School District of the City of Cincinnati,* (2003) 88 Fed.Appx. 813.

When she did not report for work on that Sunday, the airline covered her absence "with ease." Nonetheless, her employment was terminated on the grounds that she was insubordinate and "AWOL" (absent without leave).

When the employee brought suit against the airline for failing to accommodate her religious beliefs, the airline asserted that it was not required to take any steps to accommodate her because the collective bargaining agreement itself constituted an accommodation. The court rejected the airline's argument. The reasonableness of the parties' conduct under the circumstances of the particular case must be scrutinized. An employer may not use a collective bargaining agreement or seniority system as a shield from applicable anti-discrimination statutes. In this case, there was no suggestion that providing an accommodation to the employee would have denied other employees their rights under the collection bargaining agreement. Even when subject to a collective bargaining agreement or seniority system, an employer must, in order to fulfill its statutory duties, explore alternatives which might serve as an accommodation.[93]

Example: A truck driver who was a Seventh Day Adventist participated in Bible studies at his church and, as a result, became convinced that the Sabbath begins at sundown Friday and ends at sundown on Saturday. He informed his supervisor that, from that point forward, he would need to be off duty by sundown on Friday evenings. The supervisor assured him that he would "handle it." A collective bargaining agreement governed the employment relationship. When the truck driver refused to work past sundown on a Friday evening in order to deliver a final load, his employment was terminated. He filed suit, arguing that he was denied a reasonable accommodation. The truck company stated that it had offered him three different reasonable accommodations: 1) swapping shifts with other employees; 2) using vacation or sick leave to take time off to observe the Sabbath; or 3) utilizing the seniority bid system set forth in the collective bargaining agreement (which would not have resulted in the truck driver consistently being off work during the relevant Friday evening hours due to his low seniority status).

The court was not persuaded by the trucking company's arguments because, unlike the airline in the Hardison case, the trucking company made no effort at all to find a solution for the truck driver's conflict between his religious beliefs and work schedule. In fact, the supervisor's assertion that he would "handle it" was worse than if he had done nothing at all since such words would allow a reasonable person to presume that no further action would be necessary because the problem would be resolved. Indeed, in reliance upon his supervisor's assurance, the truck driver did

[93] *Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345.

not take any other action to obtain a reasonable accommodation such as seeking out other employees with whom he could swap shifts, bidding on another position with different work hours, etc.

The trucking company's attempt to rely on the mere existence of the collective bargaining agreement was rejected by the court. It noted that even when a collective bargaining agreement is in place, the employer still has an obligation to meet with the employee seeking accommodation and attempt to devise a reasonable accommodation by locating another employee to trade shifts with him/her, assisting him/her with determining whether another position exists to which he can transfer, etc.[94]

2. Reasonable Workplace Guidelines and Behavioral Restrictions

Employers may impose reasonable workplace restrictions which may serve to limit an employee's free exercise of religion. This is particularly true in the case of public sector employers who receive other benefits as compensation for accepting such restrictions. For instance, an employer may impose reasonable guidelines regarding what information employees may share with persons who receive goods or services from the employer, as well as restrict the kind of information or images that may be displayed within the employee's personal work space, particularly if other employees or members of the public enter into it.

Example: Complainant described himself as "an evangelical Christian" whose beliefs required him to "share his faith, when appropriate, and to pray with other Christians." He was employed by a county-operated social services department where he assisted unemployed and underemployed clients' transition out of welfare programs. He was frequently required to conduct client interviews, over 90% of which took place in his assigned cubicle. The complainant was admonished by his superiors not to talk about religion or pray with his clients, as well as refrain from displaying religious items where they were visible to clients. Specifically, he was instructed to remove a Spanish language Bible from his desk and "Happy Birthday, Jesus" sign from the wall of his cubicle. At no time was he prohibited from discussing religion with his colleagues. He was informed that he could pray in the break room or outside on departmental property during his lunch period and keep a Bible in his desk where it was not visible to clients.

Important, but sometimes competing, concerns require the court to perform a balancing test. In this instance, the employer's restrictions were reasonable because they neither violated the complainant's right to the free exercise of his religion nor the Establishment Clause of the First Amendment (by appearing to endorse religion). The public employer was

[94] *Rice v. U.S.F. Holland, Inc.* (2005) 410 F.Supp.2d 1301.

required to assure that clients did not misinterpret complainant's workplace behavior as an endorsement of religion. Additionally, the employer had an obligation to take steps to assure that clients were not motivated to seek ways of ingratiating themselves with complainant or seek reasons to explain a perceived failure to provide them the service(s) they sought. Therefore, any discussion of religion complainant might have with his clients "runs a real danger of entangling the department with religion." The department's need to avoid the appearance that it was endorsing religion outweighed any restrictions placed upon the complainant's exercise of his First Amendment rights.[95]

Employers may also adopt and enforce reasonable guidelines pertaining to data and images posted in areas of the workplace that are accessible to all employees and/or the public.

Example: A group of employees of a public agency formed an association and posted a flyer around the workplace, including in the women's restroom, coffee room and on bulletin boards, encouraging readers to "Preserve Our Workplace With Integrity." The group's stated goal was to provide a forum for people to "express their views on the contemporary issues of the day" such as "respect for the natural family, marriage, and family values" and "to oppose all views that seek to redefine the natural family and marriage." The flyer stated: "We believe the natural family is defined as a man and a woman, their children by birth or adoption, or the surviving remnant thereof." The employees admitted that their definitions of "natural family," "marriage" and the meaning of the flyer's call to "preserve our workplace with integrity" were anti-homosexual based upon their shared religious viewpoints, including a belief that homosexuality is "an abomination" which is "displeasing to God and assures his wrath."

The complainant was a lesbian employee who felt "targeted," "excluded," and became fearful about coming to work and interacting with the members of the group that posted the flyers. She filed a complaint of discrimination and harassment with the employer.

At the conclusion of its internal investigation, the employer ordered the employee group to remove the fliers, concluding that they violated the organization's "Zero Tolerance Anti-Discrimination/Non-Harassment Policy and Complaint Procedure." The employer re-issued the policy to all employees with a reminder that violations would result in disciplinary action. The employees were not restricted from discussing their

[95] *Berry v. Department of Social Services* (9th Cir. 2006) 447 F.3d 642. The court ruled that putting the department in danger of violating the Establishment Clause of the First Amendment and in the position of having to accept or rebut the inherent suggestion of departmental endorsement of religion that would flow from allowing the complainant to display religious items and discuss religion with clients constituted an undue hardship upon the employer.

viewpoints outside the workplace or during their lunch or break periods. They were also not prohibited from forming association and even told that they could announce the group's meeting times using the employer's e-mail system so long as the e-mail message(s) did not contain any "verbiage that could be offensive to gay people."

In response, the members of group filed a complaint alleging that they had been subjected to discrimination because of their sincerely held religious beliefs.

The employer did not violate the FEHA because it placed only reasonable limitations upon the group's ability to communicate its message, consistent with its need to efficiently fulfill its obligations to the public. "[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." The employee group had ample opportunity to voice its opinions and beliefs at appropriate times and in a manner that would not disrupt the workplace or violate the employer's policies prohibiting unlawful discrimination or harassment.[96]

Employers may also enact reasonable workplace dress and grooming standards, particularly, again, in the public sector.

Example: A peace officer began wearing a small, gold cross pin, a symbol of his evangelical Christianity, on his shirt during the time period that he was assigned to a plainclothes position. However, he continued to wear the pin after he was reassigned to a uniformed position. The police department's uniform policy stated that "[n]o button, badge, metal, or similar symbol or item . . . will be worn on the uniform shirt unless approved by the Police Chief in writing on an individual basis." The officer's written request that he be allowed to continue wearing the pin on his uniform was denied. The Chief instead offered the officer several options: 1) wearing a cross ring or bracelet; 2) wearing the pin under his uniform shirt or collar; or 3) transferring to a non-uniformed position where he could continue wearing the pin on his shirt. The officer refused all three options and defied the Chief's order by continuing to wear the pin on his uniform. When his employment was terminated on the ground that he was insubordinate, the officer sued, alleging religious discrimination.

The court rejected the officer's claim that his First Amendment right of free speech was violated by the police department, noting that appropriate restrictions may be placed on the First Amendment rights of government

[96] See *Good News Employee Association v. Hicks* (2005) 2005 WL 351743, *affirmed* 2007 WL 651452. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

employees, especially as to military and police uniform standards. The court also found that the officer's desire to wear the pin was evidence of only a personal, as opposed to public, interest which was of lesser weight than the police department's interests. The police department had a legitimate right to assure that the officer's personal religious message was not viewed by members of the public as an endorsement by the police department of that message. "[T]he city through its police chief has the right to promote a disciplined, identifiable, and impartial police force by maintaining its police uniform as a symbol of neutral government authority, free from expressions of personal bent or bias." The police department met its burden to showing that it would constitute an undue hardship to force the police department to let individual officers add religious symbols to their official uniforms.

Moreover, the police department made a good faith effort to accommodate the officer's religious beliefs, but he did not fulfill his duty to cooperate with his employer.[97]

Example: The complainant was a Roman Catholic who made a vow to wear an anti-abortion button "until there was an end to abortion or until [she] could no longer fight the fight." The two-inch wide button depicted a fetus, along with the phrases "Stop Abortion" and "They're Forgetting Someone." The complainant asserted that she desired to be "an instrument of God like the Virgin Mary" and believed that the Virgin Mary would have chosen that particular button. She also contended that she wore the button at all times, unless she was sleeping or bathing. She also believed she could not compromise her vow by removing the button and that to do so would cause her to "lose her soul." Similarly, she wore a t-shirt to work with anti-abortion messages.

The complainant's co-workers were upset by the button and some threatened to walk off the job if she did not remove it. Some of them stated that "they found the button offensive and disturbing for 'very personal reasons,' such as infertility problems, miscarriage, and death of a premature infant, unrelated to any stance on abortion or religion."

The employer offered the complainant several options: She could "(1) wear the button only in her work cubicle, leaving the button in the cubicle when she moved around the office; (2) cover the button while at work; or (3) wear a different button with the same message but without the photograph." The complainant refused to cover or remove the button, maintaining that it would "break her promise to God to wear the button and be a 'living witness.'" In response, the employer reiterated the three choices granted complainant as forms of reasonable accommodation and warned her that if she failed to comply, she would be sent home from work.

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[97] *Daniels v. City of Arlington, Tex.* (5th Cir. 2001) 246 F.3d 500.

When she reported to the workplace wearing the button, she was sent home and her employment terminated when she failed to return for three consecutive days.

The complainant alleged that she was denied a reasonable accommodation of her sincerely held religious beliefs. But the court disagreed, finding that "[t]o simply instruct [her] co-workers that they must accept [her] insistence on wearing a particular depiction of a fetus as part of her religious beliefs is antithetical to the concept of reasonable accommodation." The employer's proposal that complainant continue wearing the button, but cover it so as not to disrupt the workplace and upset other employees was reasonable because it allowed her to live up to her vow while respecting the right of other employees not to be forced to view the depiction of a fetus set forth on the button.[98]

Example: The complainant was a member of the Christian Methodist Episcopal faith who used the phrase "Have a Blessed Day" when completing a telephone conversation or signing off in written correspondence, including e-mail. She admitted that she did not use the phrase at all times but did use it both in her dealings with co-workers and vendors. An employee of one of those vendors complained about her practice. Thereafter, she was instructed not to use the phrase when dealing with that vendor.

The complainant contended that using the phrase was part of her religious practices and she would be happy to refrain from using it with particular individuals if her employer would identify the specific employee who lodged the complaint. She continued placing the phrase in correspondence and saying it to end telephone calls, even when dealing with that vendor.

However, rather than name the individual who complained, her employment reprimanded her for failing to follow its directive to refrain when dealing with that vendor. The employer took no action against the complainant for her continued use of the phrase in her dealings with co-workers or other vendors, but when she persisted, even placing the phrase in e-mails in all capital letters enclosed in quotation marks, she was again reprimanded. She complained that her employer failed to reasonably accommodate her religious practice.

The court found, however, that the employer did offer her a reasonable accommodation given that the complainant admittedly did not use the phrase all the time, had not made a religious commitment or vow to use the phrase on each and every occasion, and the tenets of her religion did not require her to use the phrase. Under the facts of the case, allowing

[98] *Wilson v. U.S. West Communications* (8th Cir.1995) 58 F.3d 1337.

her to use the phrase in her dealings with some persons and organizations, but not others, was found to be a reasonable accommodation in light of the employer's concern about preserving its relationships with vendors and customers. Moreover, had the employer allowed the complainant to continue using the phrase in dealing with the vendor in question after at least one employee of that organization complained would permit the complainant to impose her religious beliefs upon that vendor's employees.

Employers may expect employees who are granted a reasonable accommodation to adhere to the same workplace standards and conduct expectations as other employees, including procedures governing notice to the employer that the employee will be absent.

Example: A pharmacist was hired by a large discount chain store. He informed the store that he was a practicing Catholic and would not "perform the provision of, or any activity related to the provision of contraceptive articles due to conscience." Thus, he refused to fill, transfer or renew prescriptions for or otherwise dispense contraceptives, or counsel customers on contraception and contraceptive articles.

The store accommodated the pharmacist by excusing him from performing those tasks to which he was opposed and assuring that during his assigned shifts another pharmacist was always available to fill customer prescriptions for and answer inquiries about birth control. The store requested only that the pharmacist signal his co-worker when a customer required assistance in the form he declined to provide, but the pharmacist refused to do so. Specifically, he failed to summon his co-workers to assist customers when it became apparent that they sought services he would not provide and left callers on hold indefinitely. When confronted about his conduct, the pharmacist accused his supervisor of harassing him and pressuring him to attend to customers who were seeking birth control. When he persisted in his refusal to cooperate with his employer, his employment was terminated and he filed suit, claiming he had been subjected to disparate treatment and denied a reasonable accommodation of his religious beliefs.

The court dismissed his case, finding that his employment was terminated because he did not meet the legitimate expectations of his employer. In other words, the store articulated a legitimate, nondiscriminatory reason for terminating his employment. The store honored his religious beliefs and provided him a reasonable accommodation when it excused him from dispensing birth control devices and medication or providing advice about birth control. He was not, under the law, entitled to an additional accommodation, i.e., being relieved from briefly interacting with a

customer who requested a prescription for birth control before summoning another employee to assist the customer.[99]

Example: The complainant was a nurse consultant employed by a public health department who described herself as a "born-again Christian." In conjunction with supervising the delivery of home medical care to patients, she interviewed them in their homes. One such interview was conducted in the home of a male same-sex couple, one of whom was in the end-stages of AIDS. The complainant stated that she "experienced a strong sense of compassion for both men and a 'leading of the Holy Spirit' to talk with the men regarding salvation." After sharing her religious views, she told them that God "doesn't like the homosexual lifestyle." Both men complained about her conduct, alleging discrimination because of their sexual orientation. She was found by her employer to have engaged in misconduct and suspended without pay for a period of four weeks which was negotiated down to two weeks and elimination of home interviews from her assigned duties until a "Plan of Correction" was approved. She claimed that she was subjected to discrimination because of her religion.

Although public employees are not required to completely surrender their First Amendment right to free speech, the public entity must assure that its services are provided effectively and efficiently. The court found that to permit religious speech by the complainant while working with clients receiving services from the government would constitute a disruption outweighing the complainant's right to free speech. The complainant's actions were so upsetting to the clients in question that they sued the state, as well as the complainant as an individual. Therefore, "the harmful side effects of the use of religious speech with a client 'outweigh its benefits to the speaker-employee,' so that 'the employer is justified in taking adverse action against the employee in order to mitigate the negative effects.'" In other words, the state was found to have a right to control the complainant's religious speech while performing her duties in order to protect itself against disruptive and costly resulting litigation that could result from such speech. Moreover, as discussed above, the complainant's promotion of religion while conducting government business created the potential for confusion and the appearance that the public entity itself was endorsing the complainant's expressed religious beliefs, an untenable result.

There was no evidence that the complainant had ever requested a reasonable accommodation of her need to evangelize while performing her duties. The burden for requesting such accommodation is upon the employee because employers cannot be deemed to have awareness of every aspect of their employees' religious beliefs and practices that may require accommodation. The employer had already granted her a

[99] *Noesen v. Medical Staffing Network, Inc., et al.* (W.D. Wis. 2006) Slip Copy, 2006 WL 1529664.

reasonable accommodation, however, because the restriction placed upon her religious speech was only applicable when she was working with clients on official government business.[100]

Example: The complainant was an African-American and Seventh-Day Adventist who alleged that he was subjected to religious discrimination and retaliation for complaining about that discrimination. The employer's policy required employees to telephone the supervisor 30 minutes prior to the start of their assigned shift if they were unable to report on time, and provide notice 24 hours in advance of taking a vacation day. After the employer eliminated the 10:30 p.m. to 6:30 a.m. shift that the complainant had been assigned to for several years, he was given the option of working from 2:15 p.m. to 10:45 p.m. or rotating 12-hours shifts. In response, he request that he be excused from work on Fridays as a reasonable accommodation of his need to observe the Sabbath from sundown Friday to sundown Saturday.

When the complainant violated the employer's notice policy on several occasions, he was issued a written warning memorandum. Following a further violation, he was placed on a 6-month "Awareness Warning" disciplinary status. The complainant argued that because his employer knew of his religious belief and need for accommodation, he was excused from the reporting requirements, but the court held the "[n]othing about [the complainant's] religious beliefs prevented him from adhering to the 24-hour advance vacation notice policy." An employee is entitled to a reasonable, not ideal, accommodation. Additionally, during the relevant time period, the complainant and employer were engaged in the process of arriving at an effective accommodation, therefore, "it was not unreasonable for [the employer] to require [the complainant to] use his vacation time and follow call-in procedures consistent with their policies." The court found no evidence of discriminatory animus or that disciplinary action was taken against the complainant for a reason that was not legitimate and nondiscriminatory.[101]

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[100] *Knight v. Connecticut Dept. of Public Health* (2nd Cir. 2001) 275 F.3d 156.

[101] *Douglas v. Eastman Kodak Co.* (2005) 373 F.Supp.2d 218. The complainant's retaliation claim also failed since the evidence showed that his employment was terminated because he violated the company's sexual harassment policy, not as a result of his internal complaint alleging discrimination.

ANALYTICAL OUTLINE

I. Jurisdiction

Questions to be asked include whether the respondent is an "employer" within the meaning of the FEHA.[102]

II. Elements of the Prima Facie Case

A. Religious Creed Discrimination/Disparate Treatment

1. Did the employee have a bona fide religious belief or observance that interfered with an employment requirement?

2. Did the employee bring the religious practice to his/her employer's attention?

3. Did the employer take an adverse action (e.g., termination, failure to hire or select, etc.) against the complainant because of his/her religious belief or observance?

The elements of the prima facie case may also be stated as follows:

1. Was the complainant a member of a protected class?

2. Was he/she qualified for his/her position?

3. Did he/she suffer an adverse employment action?

4. Were similarly situated individuals outside his/her protected class treated more favorably or do other circumstances surrounding the adverse employment action give rise to an inference of discrimination?

B. Failure to Provide Reasonable Accommodation

1. Did the complainant have a bona fide religious belief or observance that conflicted with an employment requirement?

2. Was the employer informed of or otherwise become aware of the conflict?

3. Did the employer fail to grant the complainant a reasonable accommodation of his/her religious belief or observance?

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[102] See Chapter entitled "Jurisdiction."

C. Affirmative Defense

Can the respondent demonstrate that:

1. It made good faith efforts to accommodate the complainant's religious beliefs?

2. To provide a further accommodation would impose an undue hardship upon the respondent?

EXPLANATION OF ANALYTICAL OUTLINE

I. Jurisdiction

Does DFEH have jurisdiction over the complaint and parties?

II. Elements of the Prima Facie Case of Discrimination

A. Religious Creed Discrimination/Disparate Treatment

1. Did the employee have a bona fide religious belief or observance that interfered with an employment requirement?

   Relevant questions to be answered include, but are not limited to:

   a. What is the nature of complainant's religious belief?

   b. Does he/she ascribe to a traditionally recognized religion?

   c. Does he/she ascribe to a belief system that is not part of or normally associated with a traditionally recognized religion? If so, consider the following:

      1) Does the complainant's religious belief occupy a place in his/her life parallel to that of a god-head or supreme deity in traditionally recognized religions? (Note: This is not required in order to establish the complainant's bona fide belief, but is frequently a feature of religious belief systems.)
      2) Does the complainant's religious belief address fundamental and ultimate questions having to do with deep and imponderable matters?
      3) Is the complainant's religious belief part of or consistent with a system of beliefs, as opposed to an isolated teaching?
      4) Does the complainant's religious belief include formal and/or external signs?
      5) Is the belief at issue merely a political belief, preference or activity?

   d. Is the religious belief at issue personal to and sincerely held by the complainant, as opposed to some other person?

   e. What is the nature of the specific religious belief or observance, if any, that interfered with the employment requirement? In other words, what aspect of the complainant's religious belief, requirement, tenet or practice or what particular observance conflicted with the employer's requirements?

f. What is the specific nature of the employment requirement with which the complainant's religious belief interfered or conflicted, e.g., work hours, work day(s), assigned tasks or duties, dress or grooming requirements?

g. If the observance required the complainant to be absent from work, what were the dates and times those absences occurred or were proposed by the complainant?

h. Did the complainant's religious belief or observance interfere with a workplace policy or rule?

i. Did the complainant hold the religious belief as of the date upon which the observance was scheduled to occur or take place? (Note: The fact that the complainant did not hold the religious belief when hired is irrelevant. The appropriate inquiry is whether or not he/she held the belief as of the date the observance was scheduled.)

j. Did the complainant hold the religious belief as of the date upon which the interference with the workplace requirement such as a policy or rule occurred? (Note: The fact that the complainant did not hold the religious belief when hired is irrelevant. The appropriate inquiry is whether or not he/she held the belief as of the date that the conflict between the religious belief and workplace requirement occurred.)

Evidence to be gathered/analyzed includes, but is not limited to:

a. Any oral or written documentation of the characteristics of complainant's bona fide religious belief, creed, practices, tenets, etc., whether the religion is one that is traditionally recognized or not.

b. Any oral or written documentation of the nature of the religious observance, practice, or tradition at issue:

    1) The date(s) and time(s) complainant needed to be away from work in order to engage in a practice or observance, if any.
    2) The date(s) and time(s) complainant could not work at all due to a practice, observance or tenet of his/her religious belief.
    3) Tasks, duties or activities the complainant could not perform or engage in because to do so would constitute a violation of the tenets or mandates of the religious belief.
    4) Tasks, duties or activities the complainant was required to perform or engage in so as to comply with the tenets or mandates of the religious belief.

5) Dress or grooming standards to which the complainant was required to adhere in accordance with the tenets or mandates of the religious belief.

c. Any oral or written documentation of the workplace policy/policies or rule(s) with which the complainant's religious belief or observance interfered.

1) Employee handbook or similarly titled document
2) Supervisor's manual or similarly titled document
3) Memoranda
4) Correspondence
5) E-mails
6) Employer's public website or employee-accessible intranet site
7) Law, statute, rule, regulation
8) Collective bargaining agreement
9) Peace Office Standards Training (POST) guidelines

Interviews to be conducted:

a. Family members, friends, co-workers and other person(s) who ascribe to the same religious belief and/or engage in the same religious practices who have knowledge of the complainant's religious belief, practice or observance.

b. Representatives or officials of the religious group or organization of which the complainant is a member, if any, e.g., pastor, priest, deacon, associate in ministry, elder, bishop, with knowledge of the complainant's religious belief, practice or observance.

c. The employer's decision-maker(s), human resources representatives, supervisor(s), manager(s).

d. Collective bargaining agreement representative(s).

2. Did the employee bring the religious practice to his/her employer's attention?

Relevant questions to be answered include, but are not limited to:

a. When and by what means did the employer's decision-maker(s) learn of the complainant's religious belief?

1) Did the complainant tell the employer when applying for the job, during the employment interview or at a later date?

2) Did someone else, such as another employee, inform the employer of the complainant's religious practice?
3) Does the complainant dress in a manner, wear or display a symbol or adornment that would identify him/her as an adherent of a particular religious belief, tenet or organization?

b. Did the decision-maker(s) treat the complainant differently before learning about the complainant's religious belief than after acquiring that knowledge?

c. Did the decision-maker(s) deem the complainant's work/performance satisfactory both before and after acquiring knowledge about his/her religious belief?

d. How many times did the employee converse or otherwise communicate with the employer concerning his/her religious practice?

1) By what means?
2) On what dates?
3) What was the substance of those conversations or communications?
4) What level of detail concerning the complainant's religious practice was revealed to the employer?

e. What comments, statements or representations did the employer make orally or in writing to the complainant or any other person indicating that it understood the nature and/or requirements, observances, rituals or traditions of the complainant's religious belief or practice?

<u>Evidence to be gathered/analyzed includes, but is not limited to</u>:

a. Any oral or written documentation demonstrating the extent of the employer's knowledge of the complainant's bona fide religious belief, requirements, observances, practices, etc., whether or not the religion is one that is traditionally recognized.

b. Any oral or written documentation of the nature of the religious observance, practice, or tradition at issue:

1) The date(s) and time(s) complainant needed to be away from work in order to engage in a practice or observance, if any.
2) The date(s) and time(s) complainant could not work at all due to a practice, observance or tenet of his/her religious belief.

3) Tasks, duties or activities the complainant could not perform or engage in because to do so would constitute a violation of the tenets or mandates of the religious belief.
4) Tasks, duties or activities the complainant was required to perform or engage in so as to comply with the tenets or mandates of the religious belief.
5) Dress or grooming standards to which the complainant was required to adhere in accordance with the tenets or mandates of the religious belief.

Interviews to be conducted:

a. Other current or former employees with knowledge of the complainant's religious practice.

b. The employer's decision-maker(s), human resources representatives, supervisor(s), manager(s).

c. Family members, friends, co-workers and other members of the religious group or organization of which the complainant is a member, if any.

d. Representatives or officials of the religious group or organization of which the complainant is a member, if any, e.g., pastor, priest, deacon, associate in ministry, elder, bishop, with knowledge that the complainant brought his/her religious practice to the employer's attention.

3. Did the employer take an adverse action (e.g., termination, failure to hire or select, etc.) against the complainant because of his/her religious belief or observance?

Identify the specific act of harm in question. Then refer to and modify, as appropriate, the list of relevant questions presented in the Chapter entitled "Retaliation."

Evidence to be gathered/analyzed includes, but is not limited to:

a. All oral or written documentation related to the adverse employment action to which the complainant was subjected.

1) Performance reviews/appraisals or similarly titled documents
2) Complainant's official personnel file and supervisor's file or similarly titled documents
3) Change form(s) or similarly titled documents
4) Performance improvement plan(s) or similarly titled documents

5) Notes
6) Correspondence
7) Memoranda, including counseling memoranda and similarly titled documents
8) E-mails

b. All oral or written documentation of the causal connection/nexus between the complainant's religious belief, practice or observance and the adverse employment action to which the complainant was subjected.

1) The date the employer became aware of the complainant's religious belief, practice or observance.

2) The nature and scope/depth of the employer's knowledge about the complainant's belief, practice or observance.

c. Any oral or written documentation related to the employer's rationale for subjecting the complainant to the adverse employment action.

Interviews to be conducted:

a. Other employees, former employees or job applicants who were also subjected to adverse employment action because of their religious practice or observance.

b. The employer's representatives who participated in or gave input to those persons responsible for deciding to subject the complainant to adverse employment action and/or implemented the decision.

1) Supervisor(s)
2) Manager(s)
3) Human resource or personnel employee(s)
4) Equal employment opportunity officer(s) or ombudsperson(s)
5) Corporate officers or directors, partners

c. Collective bargaining unit/union representative(s).

B. Failure to Provide Reasonable Accommodation

1. Did the complainant have a bona fide religious belief or observance that conflicted with an employment requirement?

Relevant questions to be answered include, but are not limited to:

a. What is the nature of complainant's religious belief?

b. Does he/she ascribe to a traditionally recognized religion?

c. Does he/she ascribe to a belief system that is not part of or normally associated with a traditionally recognized religion? If so, consider the following:

   1) Does the complainant's religious belief occupy a place in his/her life parallel to that of a god-head or supreme deity in traditionally recognized religions? (Note: This is not required in order to establish the complainant's bona fide belief, but is frequently a feature of religious belief systems.)
   2) Does the complainant's religious belief address fundamental and ultimate questions having to do with deep and imponderable matters?
   3) Is the complainant's religious belief part of or consistent with a system of beliefs, as opposed to an isolated teaching?
   4) Does the complainant's religious belief include formal and/or external signs?
   5) Is the belief at issue merely a political belief, preference or activity?

d. Is the religious belief at issue personal to and sincerely held by the complainant, as opposed to some other person?

e. What is the nature of the specific religious belief or observance, if any, that interfered with the employment requirement? In other words, what aspect of the complainant's religious belief, requirement, tenet or practice or what particular observance conflicted with the employer's requirements?

f. What is the specific nature of the employment requirement with which the complainant's religious belief interfered or conflicted, e.g., work hours, work day(s), assigned tasks or duties, dress or grooming requirements?

g. If the observance required the complainant to be absent from work, what were the dates and times those absences occurred or were proposed by the complainant?

h. Did the complainant's religious belief or observance interfere with a workplace policy or rule?

i. Did the complainant hold the religious belief as of the date upon which the observance was scheduled to occur or take place? (Note: The fact that the complainant did not hold the religious belief when

hired is irrelevant. The appropriate inquiry is whether or not he/she held the belief as of the date the observance was scheduled.)

j. Did the complainant hold the religious belief as of the date upon which the interference with the workplace requirement such as a policy or rule occurred? (Note: The fact that the complainant did not hold the religious belief when hired is irrelevant. The appropriate inquiry is whether or not he/she held the belief as of the date that the conflict between the religious belief and workplace requirement occurred.)

Evidence to be gathered/analyzed includes, but is not limited to:

a. Any oral or written documentation of the characteristics of complainant's bona fide religious belief, creed, practices, tenets, etc., whether the religion is one that is traditionally recognized or not.

b. Any oral or written documentation of the nature of the religious observance, practice, or tradition at issue, including but not limited to the dates and times complainant needed to be away from work for the observance, if any.

c. Any oral or written documentation of the workplace policy/policies or rule(s) with which the complainant's religious belief or observance interfered.

1) Employee handbook or similarly titled document
2) Supervisor's manual or similarly titled document
3) Memoranda
4) Correspondence
5) E-mails
6) Employer's public website or employee-accessible intranet site
7) Law, statute, rule, regulation
8) Collective bargaining agreement
9) Peace Office Standards Training (POST) guidelines

Interviews to be conducted:

a. Family members, friends, co-workers and other person(s) who ascribe to the same religious belief and/or engage in the same religious practices who have knowledge of the complainant's religious belief, practice or observance.

b. Representatives or officials of the religious group or organization of which the complainant is a member, if any, e.g., pastor, priest,

deacon, associate in ministry, elder, bishop, with knowledge of the complainant's religious belief, practice or observance.

c. The employer's decision-maker(s), human resources representatives, supervisor(s), manager(s).

d. Collective bargaining agreement representative(s).

2. Was the employer informed of or otherwise become aware of the conflict?

Relevant questions to be answered include, but are not limited to:

a. When and by what means did the employer's decision-maker(s) learn of the complainant's religious belief?

1) Did the complainant tell the employer when applying for the job, during the employment interview or at a later date?
2) Did someone else, such as another employee, inform the employer of the complainant's religious practice?
3) Does the complainant dress in a manner, wear or display a symbol or adornment that would identify him/her as an adherent of a particular religious belief, tenet or organization?

b. Did the decision-maker(s) treat the complainant differently before learning about the complainant's religious belief than after acquiring that knowledge?

c. Did the decision-maker(s) deem the complainant's work/performance satisfactory both before and after acquiring knowledge about his/her religious belief?

d. How many times did the employee converse or otherwise communicate with the employer concerning his/her religious practice?

1) By what means?
2) On what dates?
3) What was the substance of those conversations or communications?
4) What level of detail concerning the complainant's religious practice was revealed to the employer?

e. What comments, statements or representations did the employer make orally or in writing to the complainant or any other person indicating that it understood the nature and/or requirements,

observances, rituals or traditions of the complainant's religious belief or practice?

Evidence to be gathered/analyzed includes, but is not limited to:

a. Any oral or written documentation demonstrating the extent of the employer's knowledge of the complainant's bona fide religious belief, requirements, observances, practices, etc., whether or not the religion is one that is traditionally recognized.

b. Any oral or written documentation of the extent of the employer's knowledge of the religious observance, practice or tradition, including but not limited to the particular dates and times that complainant was unavailable to work, if any.

Interviews to be conducted:

a. Other current or former employees with knowledge of the complainant's religious practice.

b. The employer's decision-maker(s), human resources representative(s), supervisor(s), manager(s).

c. Family members, friends, co-workers and other members of the religious group or organization of which the complainant is a member, if any.

d. Representatives or officials of the religious group or organization of which the complainant is a member, if any, e.g., pastor, priest, deacon, associate in ministry, elder, bishop, with knowledge that the complainant brought his/her religious practice to the employer's attention.

3. Did the employer fail to grant the complainant a reasonable accommodation of his/her religious belief or observance?

Relevant questions to be answered include, but are not limited to:

a. What effort(s) did the employer make to determine if a reasonable accommodation could be established? Stated differently, did both the employer and complainant engage in a good faith effort to arrive at a reasonable accommodation?

b. What form(s) of accommodation were considered by the employer and/or complainant and rejected?

c. What reason(s) does the respondent assert for the form(s) of accommodation being rejected?

d. What reason(s) does the complainant assert for the form(s) of accommodation being rejected?

Evidence to be gathered/analyzed includes, but is not limited to:

a. Job descriptions

b. Duty statements

c. Job function analyses

d. Work schedules for the complainant and other employees, including but not necessarily (depending upon the facts of the case) limited to those assigned to the same division, department or unit

e. Employee handbook, manual or other similarly titled document setting forth the employer's workplace rule, policy, guideline or other requirement at issue

f. Collective bargaining agreement, if any

g. Statute, regulation or rule at issue

h. Peace Officer Standards Training (POST) guidelines

i. Documentation pertaining to the mutual good faith effort to achieve a reasonable accommodation, including but not limited to:

    1) All written communications between the employer and complainant concerning the complainant's need for accommodation.
    2) Documentation related to all forms of accommodations considered and rejected by the employer and/or complainant.
    3) Documentation related to the nature and cost of all forms of accommodations considered and rejected by the employer and/or complainant.
    4) Documentation related to the impact of the proposed accommodations upon the employer's operation and/or other employees.

j. Documentation related to all requests for reasonable accommodation lodged with the employer by job applicants and

other employees, as well as the employer's consideration of and decisions to grant or deny the requests.

Interviews to be conducted:

a. Other current or former employees and job applicants who requested a reasonable accommodation of their religious beliefs or practices from the employer, whether such requests were denied or granted.

b. The employer's decision-makers – supervisor(s), manager(s), human resource or personnel employee(s), equal employment opportunity officer(s) or others.

III. Affirmative Defense

Can the respondent demonstrate that:

A. It made good faith efforts to accommodate the complainant's religious beliefs?

Relevant questions to be answered include, but are not limited to:

1. What effort(s) did the employer make to determine if a reasonable accommodation could be established? Stated differently, did the employer and complainant make a good faith effort to arrive at a reasonable accommodation?

2. What form(s) of accommodation were considered by the employer and complainant and rejected?

3. What reason(s) does the respondent assert for the form(s) of accommodation being rejected?

4. What reason(s) does the complainant assert for the form(s) of accommodation being rejected?

Evidence to be gathered/analyzed includes, but is not limited to:

1. Job descriptions

2. Duty statements

3. Job function analyses

4. Work schedules for the complainant and other employees in his/her division, department or unit

5. Payroll records

6. Budgets

7. Cost studies or analyses

8. Financial statements such as income statements, profit and loss statements, balance sheets

9. Employee handbook, manual or other similar document setting forth the employer's workplace rule, policy, guideline or other requirement at issue

10. Collective bargaining agreement, if any

11. Statute, regulation or rule at issue

12. Documentation pertaining to the mutual good faith effort to achieve a reasonable accommodation, including but not limited to:

    a. All written communications between the employer and complainant concerning the complainant's need for accommodation.
    b. Confirmation of all forms of accommodations considered and rejected by the employer and/or complainant.
    c. The nature and cost of all forms of accommodations considered and rejected by the employer.
    d. The impact of the accommodation on the employer's operation and/or other employees.

13. Documentation related to request(s) for reasonable accommodation from job applicants and other employees, the employer's consideration of and decisions whether to grant or deny the requests

<u>Interviews to be conducted</u>:

1. Other employees, former employees or job applicants who requested a reasonable accommodation from the employer, whether it was denied or granted.

2. The employer's representative(s) who participated in or gave input to those persons responsible for deciding whether to grant or deny the complainant's request for reasonable accommodation.

    a. Supervisor(s)
    b. Manager(s)
    c. Human resource or personnel employee(s)

d. Equal employment opportunity officer(s) or ombudsperson(s)
e. Corporate officers or directors, partners

3. Collective bargaining unit/union representative(s).

4. Representatives or officials of the religious group or organization of which the complainant is a member, if any, e.g., pastor, priest, deacon, associate in ministry, elder, bishop, with knowledge of the feasibility of the proposed reasonable accommodation(s).

B. To provide a further accommodation would impose an undue hardship upon the respondent?

Relevant questions to be answered include, but are not limited to:

1. What impact would the accommodation requested by the employee have upon the employer's operation, business and/or other employees?

   a. What are the employer's normal business operations?
   b. If the accommodation were granted, would another employee, supervisor or manager be required to substitute for the complainant?
   c. Would another employee be required to transfer?
   d. Would the employer have to hire a new employee to perform all or part of the complainant's job duties?
   e. What does the employee normally do when it requires replacement workers?

2. What costs, if any, would the employer incur in order to provide the accommodation requested?

   a. What is the basis for the employer's claim that the accommodation would result in more than a de minimus (minor) cost?
   b. What is the employer's net worth?
   c. How many facilities does the employer operate?
   d. How many employees assigned to each facility can perform the complainant's job duties?

3. Did the employer make a good faith effort to determine if a reasonable accommodation could be established that would not result in more than a de minimus hardship to the employer, giving serious consideration to all possible forms of accommodation?

4. What form(s) of accommodation were considered by the employer and complainant and rejected?

5. What reason(s) does the employer assert for the form(s) of accommodation being rejected?

6. What reason(s) does the complainant assert for the form(s) of accommodation being rejected?

7. Is there a collective bargaining agreement in place the terms of which impact the employer's ability to grant the accommodation?

8. Is there a statute, regulation or law that precludes the employer from granting the employee's request for accommodation?

Evidence to be gathered/analyzed includes, but is not limited to:

1. Job descriptions

2. Duty statements

3. Job function analyses

4. Work schedules for the complainant and other employees in his/her division, department or unit

5. Financial statements

6. Quotes, bids or similar documents evidencing the cost associated with implementing the accommodation requested by the complainant

7. Employee handbook, manual or other similar document setting forth the employer's workplace rule, policy, guideline or other requirement at issue

8. Collective bargaining agreement asserted by employer as precluding it from granting the requested accommodation

9. Statute, regulation or law asserted by employer as precluding it from granting the requested accommodation

10. Documentation pertaining to the mutual good faith effort to achieve a reasonable accommodation, including but not limited to:

    a. All written communication between the employer and complainant concerning the complainant's need for accommodation.
    b. Confirmation of all forms of accommodations considered and rejected by the employer and/or complainant.
    c. The nature and cost of all forms of accommodations considered and rejected by the employer.

d. The impact of the accommodation on the employer's operation and/or other employees.

Interviews to be conducted:

1. The employer's decision-makers – supervisor(s), manager(s), human resource or personnel employee(s), equal employment opportunity officer(s) or others.

2. Any expert(s) whose opinion the employer asserts to bolster its contention that granting the complainant's request for accommodation would constitute an undue hardship, e.g., accountant or economist.